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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

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Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 28th day of September, 2001, between the hours of 2:00 p.m. and 4:43 o'clock p.m. at the Texas Law Center, 1414 Colorado, Suite 100, Austin, Texas 78701.

CHAIRMAN BABCOCK: Okay. Let's go back on the record here. Have we got Justice McClure on the record?

JUSTICE MCCLURE: I'm back.

CHAIRMAN BABCOCK: Great. We're going to go over to agenda Item 2.9 so that we're certain to get the benefit of Justice McClure's report to us. I believe there has been a handout that has been given to everybody. And so and this is of course on the issue of parental notification. So without further ado, Justice McClure, fire away.

JUSTICE MCCLURE: All right. The subcommittee met in Austin on September the 7th. You may recall from a prior meeting that the parental notification Rules and forms were amended by the Supreme Court effective March the 1st of this year. There was apparently some delay experienced with different organizations that were interested in those Rule changes receiving copies of the proposed changes within the time to make public comment; and so right as the new Rules were being promulgated we received some

correspondence from an organization known as Jane's Due Process which is based in Dallas and the Reproductive Freedom Project on the East Coast. Both of those groups had sent rather thoughtful and lengthy letters expressing some concerns with some of the changes that had been adopted.

The Court had asked me at that point to offer my comments and recommendations as to whether the subcommittee ought to be reconvened and whether the full committee should look at those. It was my recommendation at the time that there was no need to reconvene the subcommittee; and at a prior full committee meeting I believe copies of those letters were handed out as were copies of the comments that I had made.

In the aftermath of that discussion I was asked by the Court to reconvene the subcommittee to address some of those issues and to allow an opportunity to have a full discussion on some proposed changes in the appellate process that I had thought were helpful and that should have been considered at some point.

So in any event, that's the reason that we met on September the 7th. I don't want to unduly belabor all of the comments that were made; but what I thought I would do is sort of identify for you the different areas that we addressed and what the recommendations of the subcommittee are.

First of all, one of the changes that was implemented in March allowed for a judge, either a trial court judge who had been assigned to hear the proceeding or a judge that had been assigned to hear a recusal issue or an appellate court judge to which an appeal was in process could request and obtain access to the verification page of the application which contains the identity of the minor; and so we made that change.

We also made the change that a guardian ad litem would have access to the verification page as well. There had been some problems in different parts of the state where that had been a concern for the court clerks as to whether they were allowed to release that information.

Jane's Due Process was particularly

concerned, one, because she did not see any need for trial judges to have the identity of the minor before them. The subcommittee unanimously recommended that we make no change, that because of issues regarding constitutional disqualification as well as issues of recusal trial courts may well need to have the identity of the minor before them so they know whether they can proceed with the hearing or not; and because the timetable keeps right on ticking during that recusal process there is a very short time fuse in which to find out that there is a recusal problem if the minor walks in and it happens to be the daughter of your next door neighbor, and then there has to be some process by which either a visiting judge is appointed or the regional administrative judge appoints somebody else to come in and hear the recusal.

So it was done primarily at the trial court level to expedite to make sure we could get these things heard within the time that was required. We also had some concern that because a judge that is disqualified because

of the constitutional provisions would be put in a position of having any order signed by that judge be void, that there would be a potential for sufficient liability for proceeding with the abortion on the minor in the absence of parental notification and without a valid bypass order.

So it is, first of all, the recommendation of the subcommittee that we make no change in the March 3rd draft of the Rules that have since been promulgated. The issue of the guardian ad litems was a little bit more complicated. There have been reports, and understand that because we don't have any documentation on any of these cases it's really all anecdotal information; but there have been situations where guardians ad litem have been appointed that have a particular agenda and that are predisposed prior to the hearing to oppose any effort by any minor to obtain an abortion without parental notification. And they did not want to be in a situation where the identity was disclosed to the guardian who may then do something untoward as far as releasing that

information or using it for some other private or personal agenda.

The thinking of the subcommittee was simply that, number one, although the Family Code contains a qualified immunity for ad litems, the Statute requires the appointment of an appropriate person to serve in that capacity; and an individual who has a bias or predisposition would likely not be construed as an appointment that would be appropriate in any event, so there is not likely, at least in my view, to be immunity for a guardian in that context.

But secondarily from a liability issue there was a concern that particularly in the more rural areas we were not going to be able to find guardians that would be willing to be appointed to represent someone whose identity they did not even know and who may at some point in time be subjected to some sort of malpractice proceeding and not have anything in their files to even indicate who the woman was or what had been done with regard to her application or what had not been done as is sometimes the case with these because they

happy so quickly.

So first and foremost on the confidentiality issue it is the recommendation of the subcommittee that we make no change to the changes that were effectuated March the 3rd -- or March the 1st.

Now Chip, do you want a vote on these as we go through each one, or do you want a full report and then discussion, or how do you want to approach it?

CHAIRMAN BABCOCK: Ann, why don't you just go through them in toto, and then we'll go, we'll double back around and have a vote if we need to.

JUSTICE MCCLURE: All right. The second issue has to do with records destruction. The original subcommittee sort of bantered around this idea and decided we would not make any recommendation as to a time frame for the destruction of records in parental notification cases. The subcommittee did not make any recommendation, the full committee did not make any recommendation, and the Court didn't adopt a Rule.

It has now been requested, and after

rather thorough discussion the subcommittee recommends to you that we require destruction of the documents 10 years from the date the application is filed. This allows a sufficient amount of time for the minor to attain her majority in the event that she would want to bring a proceeding against an ad litem, for example. It would also be appropriate in the event that there is any criminal prosecution for sexual assault or sexual indecency or physical, any sort of violence that has been perpetrated against the minor giving rise either to her pregnancy or an effort to force her to have an abortion which she did not want to have. So although that was not part of our original charge, we were asked by Justice Hecht to consider that as well, and so we do make that recommendation.

Third, amicus briefings, you may recall that when the Rules were amended in March we set up a format to allow both public generic non-case specific briefings by groups or entities that may want to file with the court a brief addressing certain constitutional

issues in general. We also created a mechanism by which someone in a particular case could file an amicus brief; and in most instances the thinking was that would perhaps be the guardian ad litem.

There was nothing included in the Rules on a briefing schedule or exactly how we were going to accomplish the minor getting the benefit of all of that information other than we required that copies be supplied to the clerk of the court and that a computer diskette be provided to the Supreme Court with instructions that if it is practicable, the clerk was to post the filing on the Supreme Court's website.

I checked this morning. There are five generic briefs that have been filed since this whole process got started; and I think a lot of the concerns that were expressed in those original letters have somewhat been resolved by internal court policy with the exception of maybe one. But in any event, we have recommended no change that with regard to the public or generic briefing other than to change the language from "as soon as

practicable" to "instanter" so that the clerk of the Supreme Court is required instanter to post the filing of that brief on the website.

Now there is not now a mechanism by which you can click on to that brief and gain access over the internet. That was the original hope that we would be able to accomplish that; and I'm still hopeful we will be able to accomplish that. As it stands now you have got to get a copy or make a copy from what the clerk has there in Austin, and that's been somewhat of a problem; but based on the existing Rules I think that's something that we can resolve just by working with the website. So other than making that minor change in language, we don't make any recommendation as to the public amicus briefings.

On the case specific briefing, evidently there has been some of that ongoing in Dallas; and the subcommittee agreed to allow Susan Haines who is a new appointee to the committee and who is a member of the board of Jane's Due Process and Teresa Collett who is a professor at South Texas.

COURT REPORTER: What is Teresa's name?

JUSTICE MCCLURE: Collett. They had agreed to draft some language to accommodate the minor's attorney to be able to get a copy of the case specific brief filed presumptively by the guardian ad litem. We don't have that draft language back. That will be forthcoming; but it will be circulated to the subcommittee, and then we will forward it on to you for consideration at your next meeting; but I think in all likelihood with those two working on it it will be unanimously approved by the subcommittee and should not generate a great deal of controversy.

There were some other recommendations as to the appellate record. As it stands under the Rules now there is no obligation for the court reporter or the court clerk to prepare the record until the Notice of Appeal is filed; and then they are directed to prepare the record instanter and file it with the Court of Appeals.

From a practical standpoint the minor does not then have the benefit of the record prior to the time that the appeal is

perfected; and since the appellate courts are required also to rule on these things within roughly a 48-hour period the minor is then forced to ask for a postponement in order to adequately brief the issues for appellate review.

What was proposed and what the subcommittee recommends to you is that we create a little bit different triggering mechanism and allow the minor by a written request filed with the court clerk and with the court reporter that once they are in receipt of that written request both the clerk and the reporter are to instanter prepare the record, and the record is then to be delivered to the attorney for the minor so that the minor then has a record by which she can compose her own briefing should she choose to do so, and then the appeal can be filed on her timetable. The Notice of Appeal can be filed with the record and with the briefing, and that will expedite that process.

The recommendation is that we create standardized forms for those requests and that we modify Rule 2.4(d) and Rule 3.2(b)

pertaining to the reporter and the clerk respectively that those are to be prepared instanter and delivered to the minor's attorney.

The next issue was the Order On Cost And Fees. Currently the Rules provide that when the court clerk transmits to the Department of Health an Order For Cost And Fees they are to telephone ahead of time in order to insure confidentiality in transmission, and there is a reminder that these orders are not to identify the minor by name and that it is confidential and privileged.

There is also a separate Rule that now requires the Department of Health to forward on to OCA a copy of any order so that we can get some sort of statistical information on how much it is costing the Department of Health to fund these applications since it comes out of their budget. That Rule does not contain those confidentiality protections, so we recommend an amendment to Rule 1.94 that before the Department of Health transmits the order to OCA that they are to call ahead to take all reasonable steps to insure

confidentiality and also remind them that the order is not to name the minor and that it is confidential and privileged, so it would just be to duplicate the language in 1.9(f) into 1.9(e).

Lastly, the Supreme Court asked us to make a recommendation to you on the remand issue. You may recall that as originally promulgated the Rules required in appellate court to either affirm the trial court's denial of a parental notification bypass or to reverse and grant. We had no option to remand. Once the Supreme Court began consideration of these cases adopted in some instances a factual sufficiency review, and we were left with the dichotomy of a factual sufficiency review that would necessitate remand and a statement in the Rules that the appellate courts could not remand.

The subcommittee initially recommended to you that we should make no change, and that because of constitutional problems with the amount of time that these cases can be pending and given the fact that because the appellate court on an intermediate level don't have to

even write an opinion so that reversing and remand gives very little guidance to either the trial court or the minor as to the deficiencies in the evidence, that that was somewhat a pointless exercise that did nothing but to cause an additional burden for the minor.

Despite that recommendation the full committee voted to eliminate that provision in the Rules that said you either affirm or you reverse and grant. So now remand is permissible under the Rule. The subcommittee by a vote of four to three recommends to you that you reconsider that and that the Supreme Court reconsider that.

And that basically concludes all that the subcommittee had before it. So I welcome anybody's questions or comments. And, Chip, how you want to approach it in terms of a vote is up to you.

CHAIRMAN BABCOCK: Thank you, Justice McClure. I assume that unless we just tell you to forget a particular item that your subcommittee is going to be working on specific language that we can take up in the

November meeting. I think that's even mentioned here in your memo.

JUSTICE MCCLURE: Yes, it is.

CHAIRMAN BABCOCK: With that said, Judge McCown has a got a question.

JUSTICE MCCLURE: Yes.

HONORABLE SCOTT F. MCCOWN: I have a question. On the destruction of records --

JUSTICE MCCLURE: Yes.

HONORABLE SCOTT F. MCCOWN: -- normally if I recall, and David Jackson may remember specifically, a court reporter only has to keep their records for three years in a civil case.

JUSTICE MCCLURE: Right.

HONORABLE SCOTT F. MCCOWN: We don't require in any other case where there is a minor that the court reporter keep the records longer that I'm aware of. For example, if there's a personal injury case that settled where the minor has a guardian, we don't keep the records longer than three years in case the minor wants to sue that I'm aware of.

And I'm just concerned about having a special Rule here particularly that we would

then have to go out and teach all our court reporters and they would have to keep these records separate. Was there any particular rationale for departing from the Statute which says three years?

JUSTICE MCCLURE: Yes. And it's partly in the statute itself. There is a requirement that, first of all, part of the legislative intent behind this statute was to utilize it as an ability to ascertain violence against minors, either sexual assault by a boyfriend, incest in a family that has resulted in the pregnancy of this child.

Replete in the statute is a requirement on the Court, on the minor's attorney, on the guardian to turn over information to law enforcement officials if they find information that leads them to believe that that had happened with regard to this child. The Rules that are in place also require the court reporter to instanter prepare the record even if the minor doesn't appeal, even if it's granted and there isn't going to be an appeal. The reporter is required to prepare the record if there is evidence that there has

been some sexual assault that has happened.

Given the fact that we have got the concerns of prosecutions arising out of these cases it was at least our consideration that we needed to maintain those records to allow sufficient time for the criminal cases to go forward, and because the criminal records are supposed to be kept for ten years we adopted that same Rule here.

The thinking as far as trying to find an appropriate time line, "Should we just adopt the 10, was that going to be sufficient if we had a girl who is 11 years old who is pregnant, you know, is 10 enough, do we need to go to 12 years, for example?" We decided that rather than extending it, although there have been some reported cases of girls 10 years of age or I think one instance younger who were in a position of being pregnant, that the 10 years was an appropriate length of time and to make it consistent with the criminal Rule.

HONORABLE SCOTT F. MCCOWN: Well, I guess my only thought about that is that the longer you keep a record, the greater the chance of a

confidentiality breach; and in our county we would have maybe 20 or 30 of these filed a year. We have hundreds and hundreds and hundreds of CPS cases filed every year alleging all sorts of crimes against children, and we keep the records three years. If law enforcement or the District Attorney doesn't proceed within three years on an alleged crime, they are not going to; and it just seems to me that we're carving out a special Rule for a tiny number of cases when we have a much larger block of cases that we don't have this Rule in. And I don't know. It strikes me as strange.

JUSTICE MCCLURE: Well, all of those concerns, I can tell you, Scott, were discussed. We do have district clerks that were on the committee; and they were comfortable with the Rule.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: Point of clarification. Are we talking about destroying the clerk's record as well?

MS. WOLBRUECK: Yes.

JUSTICE MCCLURE: I didn't hear you. I'm

sorry.

MR. GILSTRAP: Excuse me. Are we talking about destroying the clerk's record as well?

JUSTICE MCCLURE: Yes.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Okay. It seems to me that the most controversial aspect of the memo we have here is the remand issue; and because of the closeness of the subcommittee vote it seems to me that we could profitably give Justice McClure a sense of our committee as to whether or not her subcommittee should take the time to revisit the remand issue and provide us discussion fodder for our next meeting. What does everybody think about that topic? Richard Orsinger.

MR. ORSINGER: I'd like to ask a question, Ann, if I may. I interpreted what you said to be that as a practicality remand isn't helpful; but it may be constitutionally required?

JUSTICE MCCLURE: No. What I'm saying as far as the constitutional concern is the Supreme Court of the United States has said that although parental notification statutes

can pass constitutional muster if there is a bypass provision, that you are -- you really have to put it on an expedited time frame because of the biology that is involved. And the studies that Pemberton had first gathered led us to believe at the subcommittee level that anything longer than 30 days was likely not going to pass constitutional issue.

So the concern that I have myself is if this thing gets boxed back and forth between a trial judge and an appellate court where little is to be gained because we don't spell out in an opinion where the errors in the evidence lie or where the Court findings are faulty, then there is little to be gained by a remand, and then the time frame starts all over again. Once we kick it back there is another two-day period for the trial court to hold another hearing. We've got to prepare another record. That's got to come up through our cycle; and so we're just delaying getting an issue either to the minor where she can proceed or preparing it in such a posture that it can go to Austin and let the Supreme Court consider it, because unless we affirm which is

tantamount to denying her the right to go forward she can't take it to the Supreme Court.

CHAIRMAN BABCOCK: Judge McCown.

HONORABLE SCOTT F. MCCOWN: Ann, let me ask you this, though: And this is really a question. I don't have a firm opinion yet, surprisingly. But if the appellate court's only option is to affirm or reverse and grant, if that's the only option, it seems to me that you're boxing in the appellate court, and a lot of them might then affirm in cases they really should reverse or at least might affirm in cases that had the trial judge done it right, would have been applications that were granted. Do you see what I'm saying? Because appellate judges aren't going to want to reverse and grant.

And so while you appear in your rationale to be kind of favoring the minor the psychology of it might actually work against the minor. And if I was a minor's lawyer, I would rather have the option to argue for the remand and to get it back and get it straightened up in the trial court rather than

box the appellate court into affirming. Does that make any sense?

JUSTICE MCCLURE: Well, I understand what you're saying; but my concern --

HONORABLE SCOTT F. MCCOWN: I was trying to say it in code, so I wanted to make sure you did.

JUSTICE MCCLURE: It doesn't seem to me to be particularly effective unless we're going to require the Courts to write an opinion. I mean, that's another option.

HONORABLE SCOTT F. MCCOWN: Well, except if you're a trial judge and you've denied an application and they reverse it and remand it, how much of an opinion do you need to know that you've screwed up and that the other answer is the appropriate answer or may well be the appropriate answer?

JUSTICE MCCLURE: Well, I don't know how a trial judge is going to know what the problem is.

HONORABLE SCOTT F. MCCOWN: The problem is that the trial judge denied something it should have granted. Otherwise they wouldn't have reversed it and sent it back.

JUSTICE MCCLURE: Well, but I mean, on what basis? Just because we disagree that she's mature, or just because we disagree that their isn't some sort of impending threat to her if it's denied. I mean, we are not giving them any guidance.

HONORABLE SCOTT F. MCCOWN: Well, there's only two answers, and you're telling them they got the wrong one.

JUSTICE MCCLURE: Well, no. There's more than two answers.

JUSTICE PATTERSON: She's assuming that you read the opinion, Scott.

HONORABLE SCOFF F. MCCOWN: I usually do.

JUSTICE MCCLURE: Is that a wrong assumption?

HONORABLE SCOTT F. MCCOWN: I just look at whether it says affirmed or reversed. If it's affirmed, great. If it's reversed, I know I got the right answer. And the problem with only two answers if they told me I got the wrong one, it's easy to know then what the right one is.

HONORABLE SCOTT A. BRISTER: Well, and the Rule is that the Court of Appeals doesn't

have to issue an opinion. It is not that the Court of Appeals can't issue an opinion. If there is some procedural difficulty, or the wrong kind of ad litem was appointed, or the judge should have recused or something like that, you can write a one-paragraph opinion and send it back saying what should have been done right. That's not...

CHAIRMAN BABCOCK: Ann, let me ask you what was the rationale of the three members of your subcommittee who voted against having this matter reconsidered?

JUSTICE MCCLURE: They did not articulate anything other than to say they didn't want to have it changed again, that that decision had been discussed and the full committee and the Supreme Court obviously disagreed with what we recommended the first time, and they didn't want to revisit the issue.

CHAIRMAN BABCOCK: Does anybody recall, because I don't? Did we fully discuss this at one of our meetings?

JUSTICE MCCLURE: Yes, we did.

CHAIRMAN BABCOCK: Okay.

JUSTICE MCCLURE: And I lost.

CHAIRMAN BABCOCK: Excuse me?

JUSTICE MCCLURE: I lost.

CHAIRMAN BABCOCK: Was the vote at all close?

JUSTICE MCCLURE: I have somewhere the vote on that. I don't think it was particularly close.

MR. GRIESEL: I think it was about 14 to 3.

CHAIRMAN BABCOCK: 14 to 3. Is there anything that has changed between now and then other than that the subcommittee by a narrow vote said reconsider it?

JUSTICE MCCLURE: Well, that was generated because both Jane's Due Process and the Reproductive Freedom Project whose comments we were to consider were extremely upset over the change. That's what started the discussion.

HONORABLE SCOTT F. MCCOWN: Well, and that's why I say I think they may understand a lot about the biology, but not a lot about courts; and I actually don't think they're going to wind up at a better place with the procedure they're advocating.

The other thing in my limited experience is that most of these minors come in very early, and they are getting a very early decision, and that if you had a remand, you would still be timely under the biology. I don't think we have any anecdotal evidence that we're up against the wall making late term, hasty decisions.

JUSTICE MCCLURE: Well, I have some statistical information that Jane's Due Process had gathered. Eight weeks is the average stage of pregnancy reported at the time of the first call. Thirty to twenty weeks is the range for the stage of pregnancy reported by minors seeking services. Nineteen percent are fast approaching or in their second trimester of pregnancy. That's based on information that they accumulated between January 22nd and July 22nd of this year.

CHAIRMAN BABCOCK: It doesn't leave a lot of time for due process for Jane.

HONORABLE SCOFF F. MCCOWN: That surprises me, because that hasn't been my --

JUSTICE MCCLURE: It surprised me too.

HONORABLE SCOFF F. MCCOWN: -- anecdotal

experience.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Justice McClure, this is Nina Cortell. Do we know what other states are doing that have similar laws? Do we have a sense of what procedures they're using?

JUSTICE MCCLURE: To my knowledge they're not being remanded. Now I would have to go back through all of that information. That is the best of my recollection. But if you want me to gather all of that again, I can do that.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Ann, I want to return to my issue about the appropriate remedy. Some appellate systems around the country have essentially a de novo review of many trial court decisions.

JUSTICE MCCLURE: Right.

MR. ORSINGER: But this is a sufficiency of the evidence review, correct, in Texas?

JUSTICE MCCLURE: Yes.

MR. ORSINGER: And we have --

JUSTICE MCCLURE: Well, in two of the issues it is a sufficiency review. One of

them is abuse of discretion.

MR. ORSINGER: Okay. Now really from a purist standpoint it's improper for us to tell the Court of Appeals that the evidence is factually insufficient, but there's more than a scintilla, that they have to reverse and grant, because we are making them the de novo fact finders. Isn't that right?

JUSTICE MCCLURE: Well, let me put it this way, because that troubled me at the outset too about why factual sufficiency ought to be the standard in these cases anyway: But I didn't get a vote on that. We have a sort of an unusual precedent in the area of special appearances where the case law indicates the majority approach that that is reviewed at the appellate level on a factual sufficiency basis.

San Antonio sort of leads the minority approach that it ought to be an abuse of discretion standard; but what we are seeing is the courts that are applying factual sufficiency review are doing one of three things. They are reversing and remanding, they are reversing and vacating, or they are

reversing and rendering the judgment that the trial court should have entered even though it's a factual sufficiency review. So I mean, it has been done in some peculiar areas of the law; but it realistically does not fit well into the model that we normally deal with. I'll grant you that.

MR. ORSINGER: Chip, I'd like to just say for the record that I think it is unconstitutional under the Texas constitution for a court of appeals to reverse and render on a factually sufficient case. And I can go back and do a lot of research to say why, and we can all go read Justice Calvert's article on that; but I know that we're trying to create a political compromise here as well as handle it, but I'm just troubled by the idea in violation of 150 years or at least 100 years worth of procedure that we are mandating that where there is more than a scintilla of evidence, but the appellate court disagrees with the trial court, that we have a rendition and not a remand. I think that confuses the role of appellate review with the role of making the initial fact determination.

JUSTICE MCCLURE: Also understand, Richard, though, that isn't an adversary proceeding. You know, in a factual sufficiency review you weigh all of the evidence and balance it. I mean, there is no contrary view expressed.

CHAIRMAN BABCOCK: Richard wasn't here this morning either, Ann, where we were talking about wiping out 150 years.

JUSTICE MCCLURE: Exactly.

CHAIRMAN BABCOCK: So what is 100 years?

MR. YELENOSKY: This is piddling.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: This is Frank Gilstrap again, Justice McClure. The way you wipe out 150 years of Texas constitutional history is with the Federal Constitution. And I'm just wondering if there is any federal jurisprudence dictating the standard review here?

JUSTICE MCCLURE: Not to my knowledge, no.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Yes. That would trump it, wouldn't it?

MR. GILSTRAP: Just like Leatherman.

CHAIRMAN BABCOCK: Yes. Okay. I think, unless anybody wants to say anything more, I think we've talked about this. The question is whether or not we consider, reconsider or ask the subcommittee to reconsider the remand issue. And those in favor of asking the subcommittee to reconsider, revisit the remand issue raise your hand, please. Those opposed. Hold it. If you are going to, get them up early. Those who want it revisited raise your hands. Justice McClure, are you voting in favor of revisiting the issue?

JUSTICE MCCLURE: Yes, I am.

CHAIRMAN BABCOCK: I thought so. Those who are opposed to revisiting the issue raise your hand, please. It will be revisited by a vote of nine to five. So Justice McClure, if your group would revisit it and tell us what you think we ought to do at the November meeting.

JUSTICE MCCLURE: We will do that. Thank you.

CHAIRMAN BABCOCK: Uh-huh (yes). Now the other items that Justice McClure talked about

seem to me to be much less controversial. Does anybody want to talk about any of these others, or do we just want to let Justice McClure's subcommittee look at it and then come back to us in November with some specific language and recommendations? David Jackson.

MR. JACKSON: I just have a question, Justice McClure. In your discussions in the subcommittee when you talked about the timetable for the court reporter preparing the transcript --

JUSTICE MCCLURE: Yes.

MR. JACKSON: -- I know before we kind of felt like we had 48 hours to get the record, the Statement of Facts prepared. With this new written request form is there a time on that that we can kind of hang our hat on?

JUSTICE MCCLURE: Well, there is no time frame either in the statute or under the Rules as they exist for how quickly the Notice of Appeal is to be filed. The comments to the Rules thus indicate that the Rules of Appellate Procedure apply. So the Notice of Appeal doesn't have to be filed really until 30 days after the trial Court makes its

ruling.

Under the Rules as they exist the reporter and the clerk don't even have an obligation to start preparing it until the Notice is filed, so that gives us a two-day window to have it prepared, have the minor get a chance to look at it, have the Court have a chance to look at it and to rule. And it leaves no time for the minor to do any briefing, which is why the thought process was if the date of the hearing it's denied and the minor knows she wants to go forward, she can hand the clerk and the reporter that day the written request and go ahead and get it started, and then have the time that she's got to get that record and do some briefing, if she wants to, so at the time that the appeal is perfected then the Court has the benefit of the full record and briefing by the minor when we start our 48-hour clock on making a decision.

CHAIRMAN BABCOCK: Does that answer your question, David?

MR. JACKSON: I think so. As long as we've got at least 48 hours somewhere in

there.

JUSTICE MCCLURE: The Court has to rule within 48 hours after the Notice of Appeal is filed.

MR. JACKSON: Okay.

JUSTICE MCCLURE: But the only thing that this changes is it allows the minor to get the record before she files the Notice of Appeal.

CHAIRMAN BABCOCK: Okay. Any other comments or remarks about the matters that Justice McClure has reported to us on? There's no hands up, Ann, you'll be happy to know. So your subcommittee, if you will take it on for us, can report back to us with some specific language on all of these matters at our next meeting which is November 2nd and 3rd. So there's not as much time between meetings as there normally is; but if you can meet that deadline, we would appreciate it.

JUSTICE MCCLURE: We will. Thank you.

CHAIRMAN BABCOCK: Great. Thank you. And I started right out on this after the lunch break and didn't bring semi-closure to the FED Rules; and I think it is apparent that Elaine Carlson and Judge Lawrence have spent

and their subcommittee have spent an enormous amount of time and considerable thought and effort on the proposed FED Rules. And I talked to Elaine and Tom outside over the lunch hour; and they feel that with the votes we took this morning they have sufficient direction so that they can come back to us with a different scheme to allow us to consider at the November 2nd and 3rd meeting. And so we will do that, and that will be an agenda item. Okay. That's great.

The next thing on the agenda is Judge Peeples with respect to Rule 306a. And I know, Justice Duncan, this is a topic that's in your jurisdiction as well. Right?

JUSTICE DUNCAN: Right.

CHAIRMAN BABCOCK: Who is speaking on that today? They're looking at each other.

JUSTICE DUNCAN: As we discussed at the last meeting, the subcommittee has already put forward a revision to 306a. And that was discussed I believe at the October 2000 meeting; and no action was taken. Given that all that's in the packet is Judge Peeples' proposed amendment of 306a, I don't guess what

the subcommittee, the subcommittee's rewrite of 306a is even on the table.

CHAIRMAN BABCOCK: Okay. So that looks to me like Justice Duncan is yielding to Judge Peeples.

HONORABLE DAVID PEEPLES: Okay. Has everybody found in the packet the 306 and 306a materials?

MR. ORSINGER: No.

HONORABLE DAVID PEEOPLES: It's about halfway down after all this FED business. It's in the things that were handed out up here, not over on the bench (indicating).

Chip, last meeting didn't we take that proposal of mine and make some changes on it?

CHAIRMAN BABCOCK: I believe so.

HONORABLE DAVID PEEPLES: I've got a rewrite of that that I want to hand you.

CHAIRMAN BABCOCK: Okay.

HONORABLE HARVEY G. BROWN, JR.: What packet is it in?

PROFESSOR CARLSON: This fat one, Harvey (indicating).

HONORABLE DAVID PEEPLES: The big thick one that had the FED Rules that we didn't

really --

HONORABLE HARVEY G. BROWN, JR.: South Texas?

HONORABLE DAVID PEEPLES: Well, no. It's not that. It's what was handed out up here.

(At this time Mr. Greisel hands out documentation.)

HONORABLE DAVID PEEPLES: This morning we got it looks like about 100 pages that had the agenda on the front of it. Okay. And about halfway down is all the materials on 306 and 306a.

Chip, I want to start by saying that I'm going to be very frustrated if we have a random discussion of this without focusing on things we're trying to correct. We've talked and talked and talked about finality of judgments; and one thing we have not done very much is focus on what is wrong and are we going to try to fix it. And I frankly, if we're not going to do that, I just want to sit here mute. What are we trying to do if it's not fix problems? And if that's what we want to do, we ought to talk about what the problems are and then see if we can fix them

without causing problems that are even worse.

CHAIRMAN BABCOCK: I think as a general charge that always ought to be our charge. In fairness we talked about it a lot and surrounded all our talk and there was an identification of problems.

HONORABLE DAVID PEEPLES: Yes. Alex and somebody else --

CHAIRMAN BABCOCK: But you want us to be focused?

HONORABLE DAVID PEEPLES: I do.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: We're passing around something that I wrote several months ago that has a title that says "Proposed Changes In Rule 306 and 306a"; and really it's just 306 that I've got here, and it's got 17 lines. Okay?

And I want to start by just saying the problems as I understand them are as follows: And there are about four of them. Number one, there are a lot of lawyers in the state who don't know what the Rules are in this area because they are scattered throughout the cases; and you have to be somebody who reads

in this area and has read a lot of cases on a lot of different topics to know what makes a final judgment, and that's one problem. And I propose to advance the ball on that problem by codifying the Rules in this one Rule right here, 306. And that's all that that tries to do is state what I understand the Rules to be on how a judgment becomes final in Texas under the cases. Okay.

Now a second problem or set of problems deals with inadvertent, what I call inadvertent loss of rights. And when part of that happened with Mother Hubbard clauses that were used when they shouldn't have been. I mean people would have rights adjudicated because a Mother Hubbard clause got stuck in a summary judgment or some other order when it shouldn't have been, and all of a sudden everything was gone. The trial court had lost jurisdiction, time for appeal had gone by, and it was over. And I think the Lehmann case went a long way toward dealing with that problem. Okay.

Another kind of inadvertent loss of rights was what has been called the sequential

series of orders or something like that where you get a summary judgment, maybe a default judgment. Then someone nonsuits, and there is a severance, and there's all kinds of ways it can happen; but under the law as it is right now if that ads up to finality, the last order that creates finality starts your timetables. And a lot of people don't understand that.

And even if they do understand it, sometimes it happens and they didn't know it. Maybe they didn't show up for that summary judgment hearing, or maybe somebody nonsuited or filed an amended pleading or something happened that cleaned it up and made it final and they didn't know about it. And that can be a problem. I'll grant you that; but that's another one that we need to look at.

And a fourth problem is that it's just hard to know. You get these files. You've got five or six folders, and they're real thick; and to know whether things have been finalized you have got to read through there and know what is pleaded and what has been signed and severed and all the rest of it, and it's hard to know sometimes. And that's a

problem for lawyers and judges and clerks.

And those as I understand them are the problems that we ought to be focusing on. And one problem I've got with the discussion we've had so far is that I think we're finding that when you do something that will correct one of those problems you might be creating other problems in another area. For example, if you propose to have an order of appealability that has to be there or there's no final judgment, if you do that, then there are going to be a lot of judgments that everybody thinks are final, but they just remain. They will remain pending because somebody didn't do it right; and years could go by, and the trial courts will still have these judgments.

And I couldn't care less about what my numbers look like; but people rely on judgments. Or maybe they want to rely on them and they can't if it's not done right. So there are all kinds of problems. If we fix one aspect, we make another aspect worse.

So I propose what I have here that I had handed out is the proposal we talked about in June, I think it was. And we made a few

changes, and I've implemented those changes in here. This is the cleaned-up version. I think it would help a little bit if we could put the Rules, the case law Rules into a procedural Rule in the Rule books so it would be there and would summarize the law and people would presumably know it a little bit better. That might help there be less inadvertent loss of rights. At least we would know the law a little bit better.

And then if we want to go beyond that and try to deal with these other problems, I had a 306a that I just sort of tossed out there which I'll be glad to talk about if people want to try to do more. That's where I am. And frankly life goes on for me; and everything is fine the way it is under Lehmann as far as my view of the world. But if we want to make things a little bit better, I think this might help a little bit.

CHAIRMAN BABCOCK: Is there any danger in what you've done that's going to screw up something that we don't know about?

HONORABLE DAVID PEEPLES: I don't think so. I think this right here simply sets down

as I understand it what the cases say. And so this, if I'm right about that, it doesn't make things worse because it simply puts down on one page what the cases say. And if I have not done that correctly, point it out, and I think we ought to change it.

CHAIRMAN BABCOCK: Does anybody disagree with that which is somewhat fundamental, that Judge Peeples has captured? I knew Orsinger would say something. But that Judge Peeples has captured what the case law says today in his proposed Rule 306? Richard.

MR. ORSINGER: I think that what David has done works in all areas but in an agreed divorce situation.

HONORABLE DAVID PEEPLES: Yes.

MR. ORSINGER: And the problem with the divorce case in 2001 is that it's probably more than just a divorce; and it may include contract actions, equity claims, torts as well as parent/child things, and most of them are settled. And so there is no conventional Trial on the Merits, and yet there are a number of claims that may have been thrown in because the whole kitchen sink was thrown in

the original petition; but I would like to contemplate where we should put agreed judgments in here.

I think agreed judgments that purport to dispose of the whole case should also give rise to a presumption of finality like paragraph (2) rather than falling under paragraph (3) where if you forget to include a Mother Hubbard clause and there's a tort claim out there that no judgment was granted on, then your people aren't divorced. You know, because of the multiple faceted nature of family law litigation, the fact that most of them are agreed, the fact that virtually every lawyer in Texas feels qualified to handle a divorce, and many that have no business doing it do, I expect that we'll get a lot of dysfunctional paperwork. And I would rather that if it's a prove-up that purports to be a final disposition by agreement, that it be presumed to be final and fit under paragraph (2) and not (3). And if you do that, I think this is perfect.

HONORABLE DAVID PEEPLES: And I grief with what you're saying.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: And frankly, even though it may have greater application in family law cases, the rationale for what you just said would relate to any agreed judgment. There could be multiple claims in a complicated business case, and the agreed judgment doesn't quite hit on it.

MR. ORSINGER: Well, I think that probably the lawyers will do a better job of cleaning the record up. But, yes, I agree. The public policy should be the same. If you think you have a settlement and everybody is agreeing on the outcome, then when you walk out of the courthouse it ought to be final.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOWE: Well, isn't that -- I mean, most judgments are agreed. Parties settle and they agree. Why wouldn't that come within a judgment order rendered without a conventional trial? It's not a conventional trial and it says. Why is that not covered? Why do you have to put Agreed Judgment? Because 99 percent of them are agreed. The parties agree to it.

HONORABLE DAVID PEEPLES: Buddy, I think what Richard is saying is an agreed judgment ought to be presumed to be final even if it doesn't mop up every last aspect of a case.

MR. LOWE: Well, we don't put in there when people, when I settle a case with a plaintiff and we give you a judgment I don't put in there Agreed Judgment. We mail it to you. You don't sign it as an agreed judgment. You sign it as a judgment. Now what is an agreed judgment? Is that an agreed judgment or not?

MR. ORSINGER: Well, the real test for whether it's agreed or not is whether the parties consented or whether you had a contested issue to the Court to resolve.

MR. LOWE: Then if it is contested, then it's without a conventional trial, either jury or nonjury.

HONORABLE DAVID PEEPLES: Richard, why wouldn't agreed judgments include the language in 3(c), which is basically stronger Mother Hubbard? I mean, it's your catchall language that you want to include.

MR. LOWE: Exactly.

MR. ORSINGER: In other words, 3(c) has the magic language.

HONORABLE DAVID PEEPLES: Uh-huh (yes).

MR. ORSINGER: Well, that's great if the magic language is always included. I'll bet you that it won't be included in 25 percent of the cases in family law for the first three or four years; and maybe after 10 years you'll get it in 50 or 60 percent of your cases. All the rest of those people are going to stay married.

HONORABLE DAVID PEEPLES: Okay. As it is right now today if there is an agreed divorce decree that doesn't have a Mother Hubbard clause or Lehmann language and there are some issues raised by the pleadings that are not specifically dealt with, what makes it final?

MR. ORSINGER: The fact that under the case law nobody has a clear rule that you're not violating. I mean, you made this so clear that clearly --

(Laughter.)

MR. ORSINGER: No. I mean, it's really true. If we adopt this Rule, then I think 50 percent of the divorce decrees are not going

to divorce people. I could be wrong; but most people practice out of the Family Law Practice Manual, and the Family Law Practice Manual is usually at least a year behind whatever Rule change or legislature it is. So I know that 90 percent of the people that get divorced in the first year are not really going to get divorced; and then it's going to get a little bit better each year.

And these are people that should. They don't have a stake in all these complicated commercial lawsuits where the high-priced lawyers can't keep track how many different orders of disposition they have. These are just two people that might have paid $1500 for each lawyer. They slapped together some kind of sloppy decree, and they went down there and settled their case; and then 10 years later somebody wants to start getting some retirement benefits and they find out they were never even divorced.

MR. LOWE: But it's not a final divorce if it says it's a divorce? I mean, you tell me. You can have more than one final judgment in a divorce case. 301 says there's only one

except as provided by law; and the family law provides there may be more than one. Why isn't that final as to who divorces?

MR. ORSINGER: But, Buddy, right now the family lawyers all have a clause that "All other requests for relief not herein granted is hereby denied." Now that's not stating with unmistakable clarity in language immediately above, is it? If you have a generic Mother Hubbard clause, are you under 3(c)? In which event we don't change the practice at all.

HONORABLE DAVID PEEPLES: How about if we say "In family law cases an instrument entitled Decree of Divorce is presumed to be final." Just get the right title on it and it will do it.

MR. ORSINGER: That would help a lot of them. And if you'll tell me that a Mother Hubbard clause is still under 3(c), a straight Mother Hubbard clause, then really you haven't harmed the practice because the family lawyers --

CHAIRMAN BABCOCK: Is that existing law?

MR. ORSINGER: Huh?

CHAIRMAN BABCOCK: Is that existing law after Lehmann?

MR. ORSINGER: I don't think so.

HONORABLE DAVID PEEPLES: Not after Lehmann.

MR. ORSINGER: I think it's discretionary with the appellate court whether it's final or not depending on the circumstances, considering all of the circumstances.

CHAIRMAN BABCOCK: Judge Patterson.

JUSTICE PATTERSON: There are Mother Hubbard clauses, and there are "Mother Hubbard clauses"; and some of them I think do state with unmistakable clarity that it is final as to all claims between all parties. It may not say it's appealable. I mean, I had one the other day that said "All relief expressly granted is hereby denied."

(Laughter.)

HONORABLE SCOTT A. BRISTER: Just changed my mind.

MR. ORSINGER: No. That's interlocutory.

HONORABLE JAN P. PATTERSON: And I don't think it was Richard, by the way. But I wonder whether the phrase in (c) adds that

much in language placed immediately above, and whether if we take that language out and leave the rest of it, it does provide sufficiently so that it includes good Mother Hubbard clauses and doesn't change the existing law, but is inspirational so that this will be the preference of the form so it will allow a growth and a tolerance of what the existing phrases are used, but it does clarify. And I think it does serve a purpose.

I think the great benefit of this Rule is to incorporate what the law is in a Rule in one place. I think that's a great benefit, and I support it; but I think we could tinker with (c) so that it would include those.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: Recognizing that it's not a perfect world, do we advance the ball by including in paragraph (2) after the word "trial on the merits or by agreement of the parties" so that there, if it is, if it does appear to be agreed, it's presumed to be final?

MR. ORSINGER: I think you advance the ball and you don't hurt anybody.

HONORABLE SCOTT A. BRISTER: Yes. In civil cases of course outside of divorce agreed judgments are pretty rare. I mean, people nonsuit cases, people drop them. You don't incorporate an agreed judgment saying the defendant will pay the plaintiff this much money. You don't do that.

CHAIRMAN BABCOCK: That's true. Skip, do you have something?

MR. WATSON: Well, just the flip of what Frank said. My question was what is the problem of just saying "Judgments after a conventional trial on the merits or agreed judgments."

CHAIRMAN BABCOCK: "Or Judgments agreed by all the parties."

MR. WATSON: Correct. I mean, I don't see the problem that that creates; and I see that it does solve a lot of problems. More problems than saying that a document should be entitled Decree of Divorce are solved by just simply saying "or judgment by agreement of the parties, of all parties."

CHAIRMAN BABCOCK: Richard, in your practice in family law cases do you see

occasions where the parties intend to have, to agree to partial judgments leaving other issues to be disposed of by a trial?

MR. ORSINGER: The only time that that really happens is when you are trying to break up the kids issues from the divorce issues because you were able to settle the divorce and want to try the kids later. About half the judges I've talked to think you can do that. We do it in San Antonio. Half the judges in Dallas do it. Half the judges in Houston do it; but we always sever when we are doing that because our purpose is to make it part of it go final, and that's the argument. Is it severable? So but in terms of the divorce we all know that you can't dissolve the marital bonds without dividing the property; and so nobody -- I mean, sometimes for just emotional reasons or for show you go down there and you get a judgment to dissolve the marriage; but you have to tell your client in the hallway that they're still married, they're still accumulating community property, and they're still committing adultery. And so we know that.

MR. CHAPMAN: That's what you tell them in the hallway? My God.

(Laughter.)

MR. ORSINGER: But there's a lot of different reasons why people want to get a divorce. But if we -- if there is not, if we're not trying to reserve a custody trial for later on, we know that you can't get anything partial that's final.

So I'm only worried about the people that go in and think they're getting a full one. In my concept David's structure of 3(c) is the area where you have the Lehmann discretion on appeal to evaluate the recital and decide whether in fact it creates finality or not.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I'd like for agreed decrees not to be under 3(c), but to be under (2), and then there is a presumption.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: You know, Richard, recognizing that, you know, you've got to have it one way or the other, I mean, if it's in (2), under (2), and you have an agreed divorce and the parties are divorced and it's an

agreed judgment and they don't expressly carve out the custody issues, it looks to me like the custody issues are going to be decided. I mean, --

MR. ORSINGER: No.

MR. GILSTRAP: -- we have a final judgment.

MR. ORSINGER: No. They can't be because both sides are requesting. You can't say the child has no custodian and there's no child support. What would happen is your presumption would be rebutted --

MR. GILSTRAP: Okay.

MR. ORSINGER: -- because you have a whole half of your lawsuit that you didn't adjudicate and you didn't sever.

MR. GILSTRAP: You are comfortable with that you can rebut the presumption simply given the fact situation there?

MR. ORSINGER: Sure.

MR. GILSTRAP: Okay.

MR. ORSINGER: I am worried about the people who earnestly are trying to settle everything and inadvertently don't.

CHAIRMAN BABCOCK: Buddy Lowe.

MR. LOWE: All right. If you put it in (2) where you have an agreed judgment, then there is going to be an inconsistency. (3) says "A judgment or order rendered without a conventional trial." That is without a conventional trial.

MR. WATSON: Well, you just add it in (3). I mean, you just --

MR. LOWE: No. If you put it up here and you put "a judgment rendered after a conventional trial or by agreement of the parties," and then you come down here, it's going to be twice because that isn't agreed.

MR. GILSTRAP: Add it in 3 too.

MR. LOWE: And then one rendered without a conventional trial you can't get away from the fact that an agreed judgment is without a conventional trial.

CHAIRMAN BABCOCK: How about this, Buddy? What if in paragraph (2) we say "A judgment rendered after a conventional trial on the merits or a judgment agreed to by all the parties are presumed to dispose of all claims between all parties and are presumed to be final and appealable." And then in (3) you

say "A judgment or order rendered without a conventional trial on the merits except for judgments agreed to by all parties are final if, final if" --

MR. LOWE: I don't think it's -- you know, I'm not making a big deal out of it; but it is covered twice, because and it looks like we don't know what we're talking about, that we think agreed judgment is conventional trial, and we know it's not.

CHAIRMAN BABCOCK: Judge Peeples, what do you think about that? Does that fix Richard's problem?

HONORABLE DAVID PEEPLES: Well, sort of. Two things: Number one, Richard is right that there are thousands and thousands of divorce decrees that need to be final, and we need to be sure that they are. But Richard, you know, there are a lot of divorce decrees I sign where they're not by agreement. They're by default or by waiver; and so those are not agreed, but everybody intends them to be final.

I frankly I think we probably ought to just have a sentence that says in family law

cases a degree of divorce that's got that title on it is presumed to be final. I mean, I think everybody in this room would agree, wouldn't you, that we need to deal with the divorce, the family law situation?

MR. LOWE: Or the divorce decree is presumed to be final, or that, you know, and it doesn't deal with other things like property or whatever else. If it says "Divorce Decree," that a lot of times they don't, sometimes they are titled that, and they put in there, or any paper that says "Decree of Divorce" that issue is final.

HONORABLE DAVID PEEPLES: In the absence of the express language or something.

MR. LOWE: Yes.

HONORABLE DAVID PEEPLES: Make the presumption that it's final.

MR. ORSINGER: And if you have an agreed decree that also involves kids and it's called a Decree Of Divorce And Suit Affecting Parent/Child Relationship, would the same clause apply? Because it needs to.

HONORABLE SCOTT A. BRISTER: You'd say it applies to a Decree of Divorce and don't put

it in quotes; and that would mean something is substantively a Decree of Divorce regardless of what it is titled.

MR. LOWE: But it's not final as to custody.

MR. ORSINGER: Well, it normally is. In a settlement it would be normally.

MR. LOWE: After a year the Court, if you agreed to custody, you couldn't come back if some man went to the pen and his wife wanted custody?

CHAIRMAN BABCOCK: The author of this Rule has accepted the concept of Richard's friendly amendment, and so now it's a matter of language and implementation. But just because the author has accepted it doesn't mean everybody else does. And what does everybody else think? Does everybody agree with Richard, or disagree with Richard? On that subject what do people think?

JUSTICE PATTERSON: Why should it not be a paragraph (d)?

CHAIRMAN BABCOCK: Objection. Nonresponsive. Do you agree with Orsinger?

HONORABLE DAVID PEEPLES: I do think if

we agree on it, it's a matter of drafting.

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID PEEPLES: And somebody ought to draft it and come back next month.

CHAIRMAN BABCOCK: Yes. So do we agree on it? Ralph, do you agree?

MR. DUGGINS: Yes.

CHAIRMAN BABCOCK: Carl?

MR. HAMILTON: I have some other questions.

CHAIRMAN BABCOCK: Let's get to the other questions in a minute. Let me put it a different way. Does anybody disagree with the Orsinger/Peeples family law situation? Nobody appears to disagree, so let's --

MR. ORSINGER: Go ahead and close the sale, Chip, and let's move on.

CHAIRMAN BABCOCK: So David, why don't you; and if you need help from Richard, which I can't imagine, why don't you draft some language for next time.

HONORABLE DAVID PEEPLES: I think we ought to make him come back from all those foreign cities he practices law in and make him come back to San Antonio and work on this

with me.

MR. ORSINGER: We might be able to have something tomorrow morning if there is a tomorrow morning.

CHAIRMAN BABCOCK: There is a tomorrow morning; and that would be great. That would be perfect if you can have it by tomorrow morning. Okay. What? Carl, you said you had some other issues? I'm sorry. Nina, did you have something?

MS. CORTELL: Let him go first; and then I'll go.

MR. HAMILTON: I have a question about the word "presumed" for one thing. Why do we have to say "presumed"?

HONORABLE DAVID PEEPLES: That's just the Aldridge concept, San Antonio school.

MR. HAMILTON: If you have a conventional trial, does it or does it not dispose of everything?

HONORABLE DAVID PEEPLES: It's presumed. You could have a trial and some of the issues are laid aside for a later date, and the presumption would be rebutted in that instance. But this is sort of a mop-up. You

know, if there has been a trial and the judgment doesn't deal with every issue and every party, it's presumed to be final unless there's something specific in there that says it's not.

JUSTICE NATHAN HECHT: The reason for Aldridge is because people give up on stuff at trial; but they don't ever say so. They give up a defense, a counterclaim, a crossclaim, part of their claims. They pled 18 violations of the DTPA, and they give up on three of them when they get to the end. They don't ever say "Well, we're nonsuiting on these three issues." They just don't submit it to the jury and a finding is never obtained. So did they waive them or not?

And what Aldridge is trying to say is "Look, everybody has gone to trial," and you get to the end of it. If somebody doesn't say "Well, of course we reserve this issue," then if the judge signs the judgment, he meant to deal with the whole case; and if it's not in the record someplace that the plaintiff gave up on three claims or the defendant gave up on a counterclaim or whatever, it's just presumed

that that's what happened. That's the reason for Aldridge.

HONORABLE SCOTT A. BRISTER: And what would rebut the presumption?

MR. HAMILTON: Does that mean you rebut that presumption by coming back and saying "I didn't mean to waive these. Let's hear these"?

JUSTICE HECHT: There's never been a rebuttable presumption case. I don't know the answer to that exactly.

HONORABLE DAVID PEEPLES: If people have tried a case and they mean for some other issues to be litigated later, can't we expect them to say so?

MR. HAMILTON: If they don't, then they ought to have waived it.

HONORABLE DAVID PEEPLES: Absolutely. That's what that does in Aldridge. Injunction relief is going to be tried later. I don't know.

CHAIRMAN BABCOCK: At the end of the case you say "Your Honor, I assume you don't want to hear evidence on attorney's fees, or we're going to do it later, or you're going to do an

injunction later."

HONORABLE DAVID PEEPLES: But after a regular trial people are focusing on that case and on the judgment. We can count on them to do it right it seems to me; and if they don't, it is presumed to be final and you can wind up things.

MS. CORTELL: The same concept is what bothered me and is why I had my hand up also. But is it something we can maybe draft a little bit better to capture the concept and say it's final unless claims are excepted out or something? In other words, it does raise the question of what do we mean by "presumed," and when can presumption be rebutted, and when is it final or not. I'm afraid this doesn't advance the ball as much as it needs to. If we're going to get a new Rule, we should go further.

CHAIRMAN BABCOCK: Well, but doesn't -- go ahead.

HONORABLE SCOTT A. BRISTER: Back to David's original. This discussion is not because people have had problems after a conventional trial.

MR. GILSTRAP: There you go. That's it.

HONORABLE SCOTT A. BRISTER: This has been Aldridge. It hasn't been the problem. The problem is part, paragraph (3). I propose to just let (2) slide because nobody is complaining about that situation.

CHAIRMAN BABCOCK: Yes. And Nina, what I was about to say was when you start drafting more language then you get right into what David says. You start creating other problems that we can't even imagine. I mean, this is pretty clear under Aldridge. It doesn't seem to be much of a problem.

HONORABLE SCOTT A. BRISTER: I had a question on 3(a). I suppose if the order said somewhere other than next to the judge's signature "This order specifically disposes of all claims between all parties" incorrectly, what do you mean specifically "disposes of all claims"?

HONORABLE DAVID PEEPLES: Well, I think what that is supposed to mean is if you've got a judgment that really does deal with everything the plaintiff has alleged and put in issue and that the defendant has raised, it

specifically deals with them, one, two, three, four, five; but it has no catchall language, it doesn't have the Lehmann language and so forth, but it actually does adjudicate every claim between every party, that's final. That's what it's meant to do.

CHAIRMAN BABCOCK: And that's quarter, or it's just called something.

HONORABLE SCOTT A. BRISTER: Yes. But isn't that what the complaint people have is that, you know, they have the combination of (a) and (b), you have this deals with claims (a), (b), (c) and (d), and then unknown to me a Notice of Nonsuit was filed as to (e); and that's when they feel like they are getting caught?

HONORABLE DAVID PEEPLES: That's (b), isn't it?

CHAIRMAN BABCOCK: Yes. That's (b).

HONORABLE SCOTT A. BRISTER: It's the same thing, yes.

MR. LOWE: David, also when you say "expressly disposed" -- I'm sorry.

MR. HAMILTON: Don't we have to have an "and" after (a) and (b) instead of an "or"?

Because otherwise if you had compliance with (c), and then said that it was final as to all claims; but it actually did not dispose.

HONORABLE DAVID PEEPLES: It needs to be "or," Carl, because those three are stand alone. Any one of them would get it.

CHAIRMAN BABCOCK: Shouldn't there be an "or" after (a), thought?

MR. HAMILTON: What if you do not specifically dispose of all claims and all parties; but (c) says it's final as to all parties and all claims?

MR. GILSTRAP: If you've got the Mother Hubbard, if you've got the new improved Mother Hubbard language in there in (c), it does.

MR. HAMILTON: But it actually doesn't.

HONORABLE DAVID PEEPLES: Just take a case where the plaintiff alleges 10 causes of action, and the judgment is for one of them and it doesn't specifically deal with 2 through 10. If the language that's in (c) is in there, it's whole purpose is to say this case is over. Those others are washed out.

MR. HAMILTON: Doesn't it have to say that all the relief on those others is

denied? Can it just say it disposes of all the claims?

HONORABLE DAVID PEEPLES: It certainly could say it. I think --

HONORABLE SCOTT A. BRISTER: But it doesn't have to, no. I mean, it could be "Summary judgment granted to plaintiffs cause of action one. This is final as to all claims between all parties and appealable." Well, then time starts running, and the plaintiff needs to appeal and point out that that is erroneous.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: We had a case last week where, and you get every different variation of this that exists I guess eventually; but it was a business case where the plaintiff sued six defendants, announced just before trial that he had settled with three, nonsuited one during the trial, and the jury hung up; and instead of granting a mistrial the trial judge granted judgment for the two defendants.

HONORABLE SCOTT A. BRISTER: Directed verdict.

JUSTICE NATHAN HECHT: Directed verdict. And the judge signed the judgment take nothing against the two defendants. Was that judgment final? It was after a conventional Trial on the Merits. It did not refer to four of the defendants, the three who settled and the one who was nonsuited. It only referred to the two who went to the jury. The plaintiff went to the jury.

And the Court said, yes, the Aldridge presumption applies. The judgment is final, and reasoned that if it were otherwise, then you would leave up to plaintiff, the plaintiff and maybe the settling defendants to say "Oh, well, no. We didn't really settle," or "Yes. We're going to settle tomorrow" or something. You couldn't leave the finality of the judgment hostage to what the parties might testify regards to their settlement. So the judgment was final.

But, I mean, I'm sure that happens a lot of times where in multi-party cases some of the plaintiffs or some of the defendants or some combinations of them settle before they go to trial, and that may or may not be

commemorated in the final document. Of course, the careful thing would be to do it; but maybe they didn't do it. Anyway, that was last week's case.

CHAIRMAN BABCOCK: Decided?

JUSTICE HECHT: Yes. Judge Brown.

HONORABLE HARVEY G. BROWN, JR.: I had a question about the last sentence of part one. It says "At the conclusion of the litigation, the court shall render a final judgment or order." We see a lot of nonsuits without orders. I require an order; but I know a lot of courts don't particularly when you have several hundred plaintiffs or several hundred defendants with cross actions. So I wonder if there was some way to clarify that.

I know on appeal there is some issue about you needing an order; but when there isn't going to be an appeal just trying to clean it up, and I wonder if we can fix that.

MR. GILSTRAP: That's the Farmer against Ben E. Keith problem. If there's no order, --

HONORABLE HARVEY G. BROWN, JR.: Right.

MR. GILSTRAP: -- it's not nonsuited.

HONORABLE HARVEY G. BROWN, JR.: I thought

that was only for purposes of appeal. I didn't realize for purposes of making the judgment conclusive.

CHAIRMAN BABCOCK: That's a subset of that.

HONORABLE HARVEY G. BROWN, JR.: Is it?

CHAIRMAN BABCOCK: Yes. There's another case old Gilstrap got a decision along those lines against me.

(Laughter.)

MR. GILSTRAP: It's unreported.

CHAIRMAN BABCOCK: Unreported.

MR. GILSTRAP: It's unreported.

CHAIRMAN BABCOCK: Unpublished; but maybe citable.

Richard, before we go to you, Justice Hecht, the case that was just decided this week or last week, would its rationale on holding fit within the proposed 306 that Judge Peeples has?

JUSTICE NATHAN HECHT: Yes, it would. The two are consistent.

MR. HAMILTON: Under paragraph (2)?

JUSTICE HECHT: It would have been under paragraph (2), yes.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yes. I wanted to just put on the record that the way this has been written by David it says that an order is appealable, or a judgment that is rendered is final and appealable. And I just want it to be clear that it's really not appealable until the judgment reflecting the rendition is signed. We are not inadvertently changing that Rule. We're not making anything appealable upon mere rendition.

So if we adopt this Rule, it doesn't change the standing practice that you have to reduce the rendition to paper and have it signed by the judge before your appellate timetable runs.

HONORABLE DAVID PEEPLES: Do you want the word "signed" on line five instead of "rendered"?

MR. ORSINGER: No. Not necessarily. I don't care either way; but I just think it ought to be on the record we're not attempting to change the idea that only written judgments signed by judges are appealable.

HONOROABEL SCOTT F. MCCOWN: Why don't we

just say "signed" then?

MR. GILSTRAP: Instead of "rendered."

HONORABLE SARAH B. DUNCAN: It's not just line five.

CHAIRMAN BABCOCK: Okay. What do we want to do? Bill.

MR. EDWARDS: On 3(a) does a plain old vanilla Mother Hubbard clause meet the requirements of 3(a)?

MR. LOWE: No.

HONORABLE DAVID PEEPLES: I don't think so.

MR. EDWARDS: Is just expressly disposes. And if it says "All claims not ruled on are hereby denied," that expressly denies them. That's the argument.

HONORABLE HARVEY G. BROWN, JR.: They changed it to "specifically."

MR. EDWARDS: "Specifically." Well, "specifically" is the same as "expressly." What is specifically by name, specifically by referring to all claims among all parties?

MR. GILSTRAP: The phrase "expressly dispose of all claims between all parties" can't be satisfied by a statement saying "This

judgment expressly disposes of all claims between all parties."

HONORABLE SCOTT F. MCCOWN: Why not?

MR. GILSTRAP: Because that would defeat the purpose of it.

HONORABLE SCOTT F. MCCOWN: Right.

MR. GILSTRAP: That has got to fall, that phrase "This judgment expressly disposes of all claims between all parties" has got to be judged under the criteria of (c) which is a codification of Lehmann.

MR. EDWARDS: Then why do we have (a)?

MR. GILSTRAP: Because you can have a judgment that says "Relief against Plaintiff A is denied or Defendant A is denied, relief against Defendant B is denied, relief against Defendant C is granted." That does dispose of all claims and all parties in fact; therefore it's final.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I was going to raise that; but I was afraid I'd be the poster child for Judge Peeples saying somebody wasn't taking this seriously. I can tell you in West Texas people are going to read this thing, drop down

to (a), and add the phrase "This judgment expressly disposes of all claims between all parties."

CHAIRMAN BABCOCK: You have got to say specifically. "

MR. WATSON: Or address, you know, "addresses and expressly disposes of" or, you know, something.

MR. GILSTRAP: If they do, that may satisfy (c). It may satisfy the Lehmann criteria; but it has got to be judged under (c).

MR. ORSINGER: It better be in the right place or it doesn't count.

MR. GILSTRAP: Yes. That's a good point.

MR. EDWARDS: I just see people putting in summary judgment orders on one defendant out of 10 or one claim out of 15 and say exactly what (a) says.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If I read this, and correct me if I'm wrong, David, 3(a) is not telling us what has to be in the judgment. It's just telling us what the judgment has to

do.

HONORABLE DAVID PEEPLES: That's the intent.

MR. HAMILTON: But 3(c) is telling us the language has to be there.

HONORABLE DAVID PEEPLES: Well, not exactly. 3(a) and (b) and (c) are three different ways of doing it; and (c) is the sort of catchall mop-up language that tries to do what Lehmann said. (a) the intent of (a) is if you've got a judgment that actually goes through and deals specifically with the issues, it gets the job done. Even if it doesn't, you have catchall language.

HONORABLE SCOTT F. MCCOWN: But can I suggest the problem with (a) is that the idea is not captured by the words; and if (a) said "enumerates and disposes of all claims between all parties," that's what you're saying. You want them to enumerate the claim and the party and dispose of it rather than just specifically, because if I say this judgment disposes of all claims between all parties, I have specifically done it.

MR. EDWARDS: That's right.

HONORABLE SCOTT F. MCCOWN: But you want them to enumerate it and dispose. So what about that language?

CHAIRMAN BABCOCK: Say it again.

HONORABLE SCOTT F. MCCOWN: "Enumerates and disposes of all claims between all parties."

CHAIRMAN BABCOCK: Judge Peeples, what do you think about "enumerates and disposes, specifically enumerates and disposes"?

HONORABLE DAVID PEEPLES: Or refers to.

MR. WATSON: I was going to say "specifically identifies and disposes of."

HONORABLE DAVID PEEPLES: That's good. How about that?

CHAIRMAN BABCOCK: "Specifically identifies."

HONORABLE DAVID PEEPLES: I like that.

CHAIRMAN BABCOCK: Judge Peeples, is that --

HONORABLE DAVID PEEPLES: That sounds okay to me. By the way, I think people are working from two different copies here. The one that was in the materials got slightly changed in June; and I changed it again here.

For example, the word "expressly" by vote of the committee was changed to "specifically." Yes. "Specifically" what?

HONORABLE SCOTT F. MCCOWN: -- "identifies and disposes of all claims between all parties."

MR. WATSON: Where is the real one?

CHAIRMAN BABCOCK: It was a handed out.

HONORABLE DAVID PEEPLES: It was handed around. It's just a stand alone page.

HONORABLE SCOTT A. BRISTER: Let me ask about that then. So the plaintiff and defendant have counterclaims, claims against each other. The defendant moves no evidence on plaintiff's claims. The order says defendant's motion for summary judgment is granted. Then the defendant to make the case go away nonsuits its claims. That's not final even though they're going to appeal then. And we are going to have to send it back to them because when the order just said the defendant's motion for summary judgment is granted it didn't identify?

HONORABLE SCOTT F. MCCOWN: Right. But what is final is the order of nonsuit under

(b).

CHAIRMAN BABCOCK: That gets you under (b).

HONORABLE SCOTT F. BRISTER: Yes. But putting the two together, I mean, if --

HONORABLE SCOTT F. MCCOWN: Once you put them together you're under (b).

CHAIRMAN BABCOCK: That's right.

HONORABLE SCOTT F. BRISTER: Not if you -- not if -- I assumed (b) was also going to say putting them together, that specifically identifies, it seems like it would have to.

MR. EDWARDS: I was going to say I don't think (b) answers the problems set forth in either (b) or (c), paragraph (3) of your identification of problems.

HONORABLE SCOTT F. MCCOWN: Yes. You could say that in (b), "specifically identifies and disposes."

MR. EDWARDS: Yes. You can say that; but I'd say as written it doesn't meet the problems that are identified in your outline of problems.

HONORABLE SCOTT F. BRISTER: I don't have

an objection. I think it's good to make them identify; but I'm just pointing out that's going to mean lots of remands because it's not final because --

HONORABLE DAVID PEEPLES: The thing that I don't understand here is if everybody wants to make it final, they ought to put the (c) language in there by the judge's signature and be done with it. And if they don't do that, --

HONORABLE SCOTT F. BRISTER: That's an argument that ought to be -- that's an argument for a death certificate.

HONORABLE DAVID PEEPLES: It's in effect that.

HONORABLE SCOTT F. BRISTER: Yes.

CHAIRMAN BABCOCK: Okay. Subparagraph (b), do we want to make any changes to that, Judge Peeples, based on the comments that were made?

HONORABLE DAVID PEEPLES: I'm impressed that it ought to do the same thing we did on line 10.

CHAIRMAN BABCOCK: So you want to add "specifically identifies and disposes"?

HONORABLE DAVID PEEPLES: I think "identify and dispose"?

HONORABLE SCOTT F. MCCOWN: Right.

HONORABLE SCOTT F. BRISTER: Yes. It's got to be both places.

CHAIRMAN BABCOCK: Okay.

MR. EDWARDS: If there's a nonsuit or something that comes out, and somebody wants a final judgment, and it hasn't specifically done it, they just go in and ask for it. They ought to have enough sense to do that.

CHAIRMAN BABCOCK: You may be giving people too much credit, though.

MR. EDWARDS: Well, if they try to collect, then somebody is going to say "no."

CHAIRMAN BABCOCK: Yes.

MR. EDWARDS: That usually wakes them up.

CHAIRMAN BABCOCK: That will get their attention. Richard.

MR. ORSINGER: Two things I want to clarify: Is it the proposed order that was in the packet that's on the table right now or the individual page 10?

HONORABLE DAVID PEEPLES: The individual

page is a little bit updated.

CHAIRMAN BABCOCK: The individual page.

MR. ORSINGER: Okay. Secondly, under 3(c) I'm wondering if "immediately above or adjacent to" is redundant, because it either has to be above, beside or below. And in all of those instances it's adjacent, isn't it? Or do we just want to say above and below? In other words, what's the difference --

MR. YELENOSKY: Some people think adjacent is --

CHAIRMAN BABCOCK: You're way too easily amused. Do you know that?

(Laughter.)

HONORABLE SCOTT F. MCCOWN: We want to say "above and adjacent," not "above or adjacent."

MR. ORSINGER: And is below possible? We can put this after --

HONORABLE SCOTT F. MCCOWN: No.

MR. ORSINGER: -- the judge's signature?

HONORABLE DAVID PEEPLES: What I had in mind is the judge can have a stamp that can go anywhere near the signature.

MR. ORSINGER: Define "near," would you,

David?

CHAIRMAN BABCOCK: Okay. So you want to take out "or adjacent to"?

MR. ORSINGER: The stamp is going to be below the signature because there is no room to stamp it in the margins.

HONORABLE DAVID PEEPLES: Wherever there is blank space.

MR. ORSINGER: Then take "above" out and just leave "adjacent," or say "above, below or adjacent." Don't say "above and adjacent," because your stamps are 99 times out of 100 going to be below.

HONORABLE SCOTT F. MCCOWN: How about if we say "immediately next to the judge's signature"?

CHAIRMAN BABCOCK: That's the same thing.

MR. ORSINGER: Does "immediately" add anything, I mean?

HONORABLE DAVID PEEPLES: Does "adjacent" cover by the side and above and below, or not?

CHAIRMAN BABCOCK: Yes. Take out "immediately above or," so it would be "placed adjacent to the judge's signature."

HONORABLE DAVID PEEPLES: Is that all right?

CHAIRMAN BABCOCK: Okay. Richard makes an excellent point there.

HONORABLE SCOTT F. MCCOWN: Maybe we should say "within one inch."

CHAIRMAN BABCOCK: Now, now. Okay. What else?

HONORABLE SCOTT F. MCCOWN: What is adjacent?

CHAIRMAN BABCOCK: What else on this Rule? Okay. So we made a couple of changes; and Judge Peeples is going to add some family law language. Carl.

MR. HAMILTON: I have one question. If the stamp that you put on there says, quote, "This judgment is final as to all claims between all parties and is appealable," is that going to be sufficient? Does it have to say the relief, "all relief not granted is denied"? Is that right?

CHAIRMAN BABCOCK: That's right. Anything else. Okay. As --

MR. ORSINGER: I would like to ask this: What happens if the judge stamps the summary

judgment order?

MR. GILSTRAP: Then it's final.

MR. ORSINGER: Then it's final?

MR. GILSTRAP: Yes.

MR. ORSINGER: Well, they're going to do it.

MR. LOWE: Let them do it.

MR. GILSTRAP: Right now they're putting in Mother Hubbard, or they were.

CHAIRMAN BABCOCK: It makes work for appellate lawyers, Richard. Anything else? Is everybody in favor of this Rule as amended subject to the family law language? Anybody opposed to it? Okay. Nice job, David. And we'll see you on November 2nd with that family law language. It's time for our afternoon break. Let's keep it at 10 minutes.

(Recess 3:30 to 3:50 p.m.)

CHAIRMAN BABCOCK: Okay, guys. Let's get back to it. Okay. Back on the record. And we are moving right along here to Rule 306a. And I have been told that we're missing a packet of information on 306a, so all we have is what Judge Peeples gave to us, but that Sarah Duncan's committee materials are not

here. And that's going to make it hard to talk about Sarah's subcommittee's work. So the question is what do we do? Sarah, what do you think we should do?

JUSTICE DUNCAN: I don't think it's possible to talk about it without the subcommittee redraft of the Rule because the problems are discreet and the proposed fixes are discreet.

CHAIRMAN BABCOCK: And would it not make sense to talk about your subcommittee's proposed fixes in conjunction with what Judge Peeples has here or not?

JUSTICE DUNCAN: I think either way would be fine.

CHAIRMAN BABCOCK: Judge Peeples, what do you think?

HONORABLE DAVID PEEPLES: I think it would make sense to do them together.

CHAIRMAN BABCOCK: Yes. It seems to me they do too. Sorry. We're going through a transition here. So we will put that on the agenda for November 2nd and 3rd; and we're going to need to reflect that the responsibility for that Rule is both Duncan

and Peeples. And we've got the Peeples material; but we're going to need to be sure that we have transmitted to everybody the Justice Duncan's materials so that we can talk about that together. Justice Hecht, is that all right with you?

JUSTICE NATHAN HECHT: Yes. I was pointing out to David at the break that this opinion that I referred to earlier also holds that a 306a motion can be filed at any time that the trial court would have had plenary jurisdiction if the motion is granted, which is kind of obtuse; but I don't know how else to say it. So this was a very late filed 306a motion; but because it was granted and went back and reset all of the timetables, and the trial court still had plenary jurisdiction at the time the motion was granted, and so the motion was okay. And the Courts of Appeals have disagreed about that issue over the years.

JUSTICE DUNCAN: And I think our subcommittee's proposal adopted that line of cases that's now reflected in the Supreme Court's case. And, Chip, just to correct

perhaps this impression, the material, the subcommittee'S material has already been given to the committee.

CHAIRMAN BABCOCK: I know. It's just not here today. I mean, it's not in my notebook. I don't think it's in anybody's notebook.

HONORABLE SARAH B. DUNCAN: Right.

CHAIRMAN BABCOCK: Yes. This is not a newly created thing that somebody forgot to bring today. It's just that it's been created prior; but we didn't get it in the notebooks and didn't get it among the materials to consider; but the good news is we have lots of things to talk about. And the best one would be the en banc court, which I believe Frank Gilstrap has got something to say about. Was that in Dorsaneo's committee or what?

MR. GILSTRAP: Yes, it was. There is a memo that I sent to everybody by e-mail; but it was late in the day. It's on the table behind Judge Brister. If you don't have it, it looks like this, and it's a memo dated today from me to Chip Babcock (indicating). And if you'll get that in front of you, it will probably help you move through this

fairly quickly.

This problem concerns the composition of the en banc court. Let me wait until everybody gets that. All right. This matter concerns the composition of the en banc court, and particularly the 1997 amendment to Rule 41.2(a) which requires that a visiting justice who served on the three-justice panel in the panel decision also becomes a member of the en banc court if there is a request for en banc consideration.

This matter came before this committee as a result of an e-mail from Justice Tim Taft of the 1st Court to Justice Hecht. That e-mail is on the second page of the handout. At the June meeting that was referred to the Appellate Rules Subcommittee chaired by Professor Dorsaneo. He asked me to write a memo. The memo appears next in the material. And if you'll look on the first page of that memo, you'll see the language that causes the issue.

In the middle of the page we've got the pre-1997 rule which says the en banc court means the majority of the members of the

court; and in the 1st Court at least they interpreted that to mean the elected judges, not visiting judges.

Then in 1997 the Rule was amended that, and it now unmistakably says that if there is a visiting justice, he or she becomes -- if there is a visiting justice on the panel, he or she becomes a member of the en banc court. This raises the possibility that Justice Taft has written about on a couple of occasions that when the case is considered en banc the visiting judge will team up with a minority of the elected judges to defeat the will of a majority of the elected judges. He touched on that in a case that we've cited in the middle of page two which is entitled Palasek or Palasek. It depends on what part of central Texas you come from. And in that case the possibility was raised, but it didn't happen. In that case it was decided en banc, and six members of the -- six of the nine elected justices were on the winning side. Nevertheless Justice Taft who wrote the majority opinion talked at length about this issue; and in the middle of page three he even

had a statement that he was calling this attention to the consideration of the rulemaking committee, that being us.

That was early in the year 2000. Late in 2000 Just Taft's fears were realized when a case called Willover which is talked about on page four was decided. In that case there was a three-justice panel. One justice was visiting. There was a request for a motion for en banc rehearing, and under the amended Rule that justice joined the nine elected justices of the 1st Court to create a 10-member en banc court. That court divided five to five on the request for en banc rehearing; and based on the way they interpreted the Rules the motion failed because it didn't receive a majority. A majority had to be six.

As it turned out the five members who wanted en banc rehearing were elected justices. The five members who did not included four elected justices and the visiting justice. Thus the will of the majority of the elected justices was thwarted.

And if that were all the problem, then we could have a nice robust discussion about policy and I think come to a conclusion, because I think the policy questions here are pretty self evident. However, Justice Taft went on and raised some concerns about the validity of the en banc Rule; and these get to be more difficult.

His principal argument is that the 1997 amendment to the en banc Rule conflicts with a section of the Government Code; and these two provisions are laid out on page six of the memo. At the top you see the old pre-1997 Rule which said the en banc court consists of a majority of the members of the court. That of course was repealed or superceded by the 1997 amendment. Unfortunately there was also a section of the Code of Criminal -- excuse me -- Government Code -- excuse me -- that also described, said that when convened en banc a majority of the members of the court constitute the court.

Justice Taft saw that as a problem, and he then went into the question of whether or not the 1997 Rule had judicially repealed this

procedural statute. There are two provisions allowing this, one is Section 22.004 of the Government Code for the Supreme Court. The other is a similar, but narrower provision 22.108 for the Court of Criminal Appeals.

And this is a difficult area. It contains a lot of fundamental problems involving separation of powers and some history here; and so I found it to be a difficult issue. And then when you add the fact that we're dealing with the Court of Criminal Appeals and not the Supreme Court it seems to me to be more difficult.

A further element of complexity was added by the fact that Justice Taft referred back to Polasek in which, and I didn't know this, in that case the Houston 1st Court ruled that Civil Rule 13.(a) dealing with court reporters was invalid because it conflicted with an existing statute in the Government Code and there was not in fact a judicial repeal.

Finally I got a little uneasy about this because this is after all a pending criminal case and involves life imprisonment for aggravated sexual assault on a minor, and it

was a very hard fought case out of Walker County.

Fortunately the end of the story I think is this: The Texas, the Court of Criminal Appeals two weeks ago granted the petition for discretionary review in Willover and is going to decide this case and hopefully decide this issue. Based on that after conferring with Bill Dorsaneo and in view of the fact that several members of the appellate subcommittee are not here today, our recommendation is that we defer this issue until after Willover is decided, and then we can come back to it with the guidance hopefully from the Court of Criminal Appeals.

CHAIRMAN BABCOCK: Any dissent? Justice Duncan.

JUSTICE DUNCAN: I don't see a need to defer consideration of the issue. What the Court of Criminal Appeals has done is decide to hear the case; and I don't know if you've looked at the issues that it has agreed to review. But even assuming it's agreed to review this issue, I don't see that that affects either the civil cases or what the

Rule ought to be in the future.

CHAIRMAN BABCOCK: Is this a TRAP Rule that would affect criminal cases as well?

HONORABLE SARAH B. DUNCAN: Yes.

MR. GILSTRAP: Civil and criminal, yes.

HONORABLE SCOTT A. BRISTER: Yes. In other words, I wouldn't mind deferring until Mike or some of the other appellate judges are here; but I would be in favor of changing the Rule regardless of what the Court of Criminal Appeals says. If they say it's unconstitutional, then we have to change the Rule to make it constitutional. If they say it's not unconstitutional or it is binding, then I want to change it, because that's what the Rule says, then I want to change the Rule in any event.

CHAIRMAN BABCOCK: Yes. Richard.

MR. ORSINGER: I concur with what Scott just said. I would vote to change the Rule regardless of what the Court of Criminal Appeals thinks about the Rule. And I'm not saying we have to do that today. I think we have some talent here today. I see several, I see three Court of Appeals or two Court of

Appeals judges.

CHAIRMAN BABCOCK: We have lots of talent here.

HONORABLE SCOTT A. BRISTER: Yes. One of them has got a flight in less than an hour.

JUSTICE MCCLURE: I'm still here.

MR. ORSINGER: So maybe --

JUSTICE MCCLURE: Four.

MR. ORSINGER: -- we don't have enough talent here. I don't know. Four Court of Appeals justices.

CHAIRMAN BABCOCK: Justice Duncan.

JUSTICE DUNCAN: One thing to consider; and I haven't seen the order in the Willover case; but at least the orders that I have seen from the Supreme Court assigning visiting judges in the Courts of Appeals, and the reason the San Antonio court resolved it as is reflected in the current Rule is that the visiting judge is assigned to the case, is not assigned to the Court either through first judgment in the Court of Appeals or some other interim point. And it seems to me that as long as that is the case I'm not going to be the one to say that we should change the Rule,

amend the Rule to be inconsistent with the Supreme Court's Appointment Order. I have no problem suggesting to the Court that perhaps it might like to modify it's Appointment Order; but the Rule as it now exists accurately tracks the Court's Appointment Order.

HONORABLE SCOTT A. BRISTER: I think everybody needs to look at the Visiting Judges Appointments Order. We've got -- there is a Forth Worth case, and we've got one currently where the the sitting judge, trial judge tried to take it back from the visiting judge. The Fort Worth court said he couldn't do it. Once you've transferred it to that visiting judge you can't get it back. That's his case. And I was shocked to find that out.

JUSTICE DUNCAN: That's true.

HONORABLE SCOTT A. BRISTER: And if that's so, and that was solely on because that's what the regional presiding judge's Orders say. And there is some variation in those. If that's so, we need to talk to the presiding judge.

MR. EDWARDS: The Supreme Court has

denied mandamus in the case where the trial judge took it back, and it's not reported.

HONORABLE SCOTT A. BRISTER: It's up in the air. But again, those are --

HONORABLE SARAH B. DUNCAN: We're talking about the Supreme Court Order appointing the judge to that case in the Court of Appeals. Right? We're not talking about what trial judges do.

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Frank, then Richard, then Judge McCown.

MR. GILSTRAP: If we were just talking about policy, I wouldn't have any problem in diving in today. But if the Court of Criminal Appeals agrees with Justice Taft's dissent and says that there wasn't a judicial repeal of the statute and the statute is controlling, then we can't do anything about it.

HONORABLE SCOTT A. BRISTER: But we need to change the Rule.

MR. GILSTRAP: No. We can't. The legislature has -- if the Court of Criminal Appeals says that the Rule didn't change it and can't change it because there is a statute

there, then the legislature has got to change the statute.

CHAIRMAN BABCOCK: Or by Rule you could repeal the statute.

MR. GILSTRAP: No. That's the point. He says that you can't repeal it. That's his point, because it does work substantive changes in the rights of the parties. And if the Court of Criminal Appeals says that we can't change it, I'm not sure anybody can change it.

CHAIRMAN BABCOCK: Do you know for a fact that that's one of the issues that they are considering?

MR. GILSTRAP: I don't know.

CHAIRMAN BABCOCK: Is there a way to ascertain that?

HONORABLE SARAH B. DUNCAN: Yes.

CHAIRMAN BABCOCK: Yes. We should look at that, shouldn't we?

MR. GILSTRAP: I guess we could, yes.

CHAIRMAN BABCOCK: Scott.

HONORABLE SCOTT F. MCCOWN: Well, --

CHAIRMAN BABCOCK: I'm sorry, Richard.

HONORABLE SCOTT F. MCCOWN: Oh, I'm --

CHAIRMAN BABCOCK: Sorry. Do you yield to Scott?

MR. ORSINGER: Sure.

HONORABLE SCOTT F. MCCOWN: I'm just going to suggest that I think this might be better put off as well, because I think the legal arguments that Justice Taft is making can be argued either way. I'm not convinced that he's right about the law; but if he's right about the law, then that may compel, as Frank said, that may mean we can't change the Rule whether we wanted to or not.

The other question I just had was one of the things that Justice Taft says is that the current Rule is different from the federal Rule. And I was wondering if the feds had changed their Rule, because my understanding of the federal Rule was that a senior judge who participated in the panel got to participate en banc.

JUSTICE NATHAN HECHT: Or an assigned judge.

HONORABLE SCOTT F. MCCOWN: Or an assigned judge.

JUSTICE NATHAN HECHT: Or somebody, a

district judge from California that's assigned to the 5th Circuit panel can participate in en banc consideration of the case or the vote taken en banc.

HONORABLE SCOTT F. MCCOWN: I think Justice Taft is assuming that it's the other way, if I'm reading this right.

JUSTICE NATHAN HECHT: Once they changed it.

HONORABLE SCOTT F. MCCOWN: And I just wanted to say one last thing. I mean, I sense that there are a lot of people here who think it ought to be just the elected judges; and I'm not convinced as a policy matter that that's correct.

MR. GILSTRAP: I wasn't particularly moved by his analogy to the federal Rule. I think he might have been getting, trying to get a dig in over the decision on Connor against First Court of Appeals; but that's just speculation.

But the point is in the feds you don't get an elected judge. I mean, that's the distinction. And Justice Taft seems to think it's very important that elected judges decide

the case; and that's really the heart of the policy debate here. And it seems to be if we go there, that's what we're going to be talking about.

HONORABLE SCOTT A. BRISTER: I would like to have somebody in on it, because this applies to criminal -- it applies only to criminal cases. The fact of the matter is -- I mean, maybe not. But basically the civils you can strike the visiting judge. The criminals you can't. So this is -- the problem is in spades in criminal cases, and it is a very hot issue to the DAs and stuff like that. People who aren't elected are deciding these matters, and there's nothing you can do about it. And, you know, somebody from the Court of Criminal Appeals or the DA or something like that might need to be in on this.

HONORABLE SCOTT F. MCCOWN: That's true of all cases with a visiting judge.

HONORABLE SCOTT A. MCCOWN: The visiting judge is less of a problem for civil litigants because they get a strike, they get three strikes.

MS. SWEENEY: Only gets one.

HONORABLE SCOTT A. BRISTER: You get it unlimited as to Farmers.

JUSTICE DUNCAN: There is another statute that governs striking a visiting appellate judge.

MR. LOWE: Right.

JUSTICE DUNCAN: And I believe it applies to civil and criminal.

HONORABLE SCOTT A. BRISTER: At the 1st and 14th it just applies to civil, whatever it says.

(Laughter.)

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On the last point I think that you may -- it may not occur to you to strike the visiting judge until after he's voted against you, by which time it's too late.

HONORABLE SCOTT A. BRISTER: Absolutely.

MR. ORSINGER: But the thing that's offensive to me about this given the fact that we have an elected judiciary is that in this particular case we apparently had a majority of the bona fide, constitutionally elected

judges who wanted to rehear a decision of a panel, and a nonmember of that court, even though they're de facto functioning as a judge, was able to keep the majority of the court from addressing it.

That's offensive to me; and I would support us investigating that. And I don't say we have to do that today. Maybe Bill Dorsaneo and Mike Hatchell need to be here; but I do think that we shouldn't wait for the Court of Criminal Appeals to make a decision that really probably is only going to impact the criminal application anyway.

HONORABLE SCOTT F. BRISTER: But whether they're elected or whether they're visiting they're a bona fide judge.

MR. ORSINGER: You say that; but I'm not sure that that is right.

HONORABLE SCOTT F. MCCOWN: Well, the Constitution says that. If I am a visiting judge in a trial court, and I rule, I am there pursuant to the Constitution. And there may be certain safeguards for striking; but if you don't and I'm there, I'm a bona fide judge.

And let me just finish this thought.

I'll give you another example. On the Supreme Court if there is a judge who can't sit, the governor can pick a lawyer, makes him a Supreme Court judge and have him cast the deciding vote in the most important case you've got; and that counts, and he's never elected.

MR. ORSINGER: You just made my case.

HONORABLE SCOTT F. MCCOWN: No. I'm saying "no."

MR. ORSINGER: A majority of the elected judges of this court wanted to review the case, and they were thwarted from doing that because of the participation of a nonelected judge.

HONORABLE SCOTT F. MCCOWN: And what I --

MR. ORSINGER: I'm not talking about eight members of the Supreme Court plus one replacement. I'm talking about 10 members of the Supreme Court or 11 members of the Court of Appeals or whatever you want. There was a majority. It was a duly elected majority, and it was thwarted by the appointment of a replacement.

HONORABLE SCOTT F. MCCOWN: And what I'm

saying is that it doesn't matter whether you're elected or whether you're there by assignment. You are constitutionally there, and that in our law we don't recognize elected as having any more clout or status once they are properly there. And the example I gave is very telling because you could have a 4/4 division on the Supreme Court, and the entire case could be decided stare decisis for all time by an appointed judge constitutionally appointed by the governor.

MR. ORSINGER: But, Scott, you know --

JUSTICE NATHAN HECHT: I'll add to what Scott said. You have one case where three judges were recused, so the Court was comprised of six regular sitting judges and three specially assigned judges. So it didn't happen in that case; but the ruling could have been five to four with three of the all three assigned judges taking the side of the majority and only two elected judges being --

HONORALBE SCOTT F. MCCOWN: Judge Hecht has much improved my argument; and I appreciate that.

MR. ORSINGER: At least what happens, in

that situation what happened was the court got an opportunity to adjudicate it. In this situation what I consider to be the real minority of the court kept the real majority of the court from even having a say-so on the decision.

HONORABLE SCOTT F. MCCOWN: Well, there's another way to look at it, which is a litigant had a judge. The judge ruled, and then procedurally the losing side knocked the judge off the case and took away that litigant's vote after they lost and maneuvered the case in front of a new group of judges.

CHAIRMAN BABCOCK: Justice Duncan.

JUSTICE DUNCAN: So long as we have a system that recognizes and appoints visiting judges and a system that permits constitutionally the transfer of cases between Courts of Appeals I don't see how you can have a system simultaneously that gives one kind of judge more power or clout or vote and deprives another kind of judge of a vote.

I could argue all the day long that transferring cases between Courts of Appeals shouldn't be constitutional; but it is. And

as long as it is there will be judges that you didn't elect deciding your cases. And I don't see how we start meting out votes depending on whether you were elected in that district or elected in some other district or elected ten years ago or elected last year. How are we going to? A judge once they're appointed to the case is a judge with a vote.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: In these, in this, in Polasek there was an argument raised by the defendant that it was unconstitutional for a visiting judge to hear his case. And in Willover Justice Duncan -- excuse me -- Justice Taft -- excuse me -- says that it's unconstitutional to have the case decided by a -- to have the will of the majority thwarted.

But where that ultimately goes is that you can't have the visiting judges; and that's probably not going to be the result. Justice O'Connor did take that position in Polasek. She says "I think it's unconstitutional to have a visiting judge." But we're probably not going to wind up there. I can't imagine that

really happening.

That being the case everything is going to be a certain compromise. Whenever you have a three-judge court and one of them is a visiting judge and the two elected judges divide then essentially the visiting judge is deciding your case. That's the way it is. I think that where Justice Taft is going is ultimately is you can't have it perfect; but in this case, in this case what we need to do is not allow the visiting justice to appear to be part of the en banc panel.

Now I think that's the policy called in front of us; and you can go both ways on that. It seems to me it makes good sense to have the visiting justice who has already considered the case in the panel appear with the en banc court; but it may be that the desire to have the case decided by elected judges outweighs that. That is really the policy call.

CHAIRMAN BABCOCK: Buddy, then Ralph.

MR. LOWE: You know, the parties are only interested in the end results, who wins or loses. If these people can make that

decision, are we going to piddle around and say they're not qualified to be considered en banc? I mean, that's the whole guts of it. It comes right down to who is going to win and who is going to lose, who can vote on that. And if he can vote on that, why can't he vote on the other?

MR. DUGGINS: I was going to ask as a point of clarification, because I agree with what I think you're saying, Buddy, is if they're not permitted to make, have a vote on the decision of whether to go en banc, do they still get a vote on the merits if it goes en banc?

MR. GILSTRAP: I don't think so. I don't think so, because again, if the same policy reasons that would say they can't decide whether the case goes en banc would also mean they can't decide the case en banc, because again the will of the majority could be thwarted.

MR. DUGGINS: But that then makes the very point Sarah and Scott are making. You change the Constitution, which even though I don't happen to agree that a judge who is

voted out of office should continue to be able to serve that's not anything we can decide.

As long as the Constitution permits the assignment of visiting judges, I mean, the federal system it seems to me is analogous even though they're not elected. The point is they're not active members of the court any longer; but they're permitted to decide.

Or you even get, as Justice Hecht was saying, a district judge from an entirely separate circuit. If they get a vote on the merits, I think they get a vote on this. Although I think the issue is do we take this up today; and it seems to me that a number of people are missing, and out of deference to them we might want to wait.

CHAIRMAN BABCOCK: It seems like we're sort of taking it up.

MS. SWEENEY: It also seems that we are putting more deference on the Courts than on the litigants. The litigants are going to get this visiting judge imposed on them, may or may not be able to object depending on whether they've used their strike or not, and no one is concerned about that; but we are concerned

about thwarting the will of the rest of the justices. I don't think you can have a judge who is okay to rule on the issues and okay to rule as to the litigants, but not okay to potentially disagree with other members of the court.

HONORABLE SCOTT F. MCCOWN: Well, and as someone who may be a visiting judge some day, I mean, we have a great many very fine visiting judges who go and give their service; and it seems to me that we ought not be casting any doubt on their legitimacy.

MS. SWEENEY: Well, if we're going to have them, then I think we have them for all purposes. I don't think that you can differentiate, you know, "You're good enough for the litigants. You can rule on these issues that may be dispositive. You can go ahead and, you know, uphold or reverse this important case; but well, you all of a sudden now are illegitimate because there's an en banc issue, and you might thwart some elected judge." That intellectually isn't very consistent.

CHAIRMAN BABCOCK: Yes, Richard.

MR. ORSINGER: Another distinction with the federal judiciary is that they are judges until they die unless they resign even though they take senior status. But around here when you cease being an elected judge you're only a judge for a day or however long or for a case. And I'm not totally sure about the constitutionality of that. You know, maybe some day I'll go look that up.

Secondly, to me there is a question between, a difference between voting to keep a court from considering an issue and having your vote counted on the disposition. It's more offensive to me that someone not on the court can keep a majority of the court from even taking a vote than it is if they vote against the majority of the court and win. To me those are separate questions.

CHAIRMAN BABCOCK: It would have been okay for you if they had taken it en banc and affirmed on a 5/5 decision with a visiting judge?

MR. ORSINGER: Well, I think that that would make a difference on whether the Supreme Court might grant review. If you have

an en banc court that's split five to five, and the majority voted to overturn the panel opinion, some justices on the Supreme Court might consider that in deciding whether to grant review. I mean, there is a lot of potential there.

And I had a third point; but I forgot it. I'm sorry.

CHAIRMAN BABCOCK: I am sure it was cogent however. Okay. Let's defer this thing. What do you think? No. I don't think we're going to resolve it today unless somebody wants to push it to resolution.

And I'll tell you another thing. I'd be very interested in knowing whether the Court of Criminal Appeals is taking up this particular issue, because if they are, I'm not sure that our committee, as unofficial as it is and as perhaps unimportant as it is, --

JUSTICE MCCLURE: I just sent an e-mail to my staff attorney to check, because she has all of that information. So hopefully in the next little bit we'll know.

CHAIRMAN BABCOCK: That's great. Thank you, Ann. But assuming that it is an issue, a

live issue, I'm not sure that our committee ought to be talking about a live criminal case and saying how it ought to come out.

MR. ORSINGER: Well, I mean, our Rule change would be prospective. In other words, if the Rule is dispositive and it's not decided by the Constitution or a statute, we're not going to affect the outcome of this case.

JUSTICE DUNCAN: We sure talk about a lot of live pending civil cases.

CHAIRMAN BABCOCK: I know we do. There is something about a guy's liberty that may be at stake that seems different to me. Maybe not.

HONORABLE SCOTT F. MCCOWN: One last thought about this is that, you know, the fellow who won before the panel, if you allowed the visiting judge to continue, and he wins en banc, then he's won. If the majority of the elected judges really think that's the wrong rule of law, there will be another case come down the pike that they can take en banc and overrule. It's not, you know, the end of the world.

MR. EDWARDS: But those who practice law in the district courts would like to know what the Rule is.

HONORABLE SCOTT F. MCCOWN: Well, if it's that close, they won't really know until the Supreme Court decides.

MR. ORSINGER: The Rule is probably the opposite of the case because you know that the next time it's going to be overturned unless somebody resigns.

MR. WATSON: I just wanted to echo what you just said. I mean, it seems like we're launching in to somewhat neuter the efficacy of the appointed judge in some respect. Once you're doing that, regardless of how valid the reason, even if it's just on a vote on a procedural issue, you've neutered the efficacy of that appointed judge and of all appointed judges. And if we launch beyond that into kind of saying we really don't care what the Court of Criminal Appeals is doing, I'm not sure we're doing a whole lot for that court either. You know, there is no reason to rush into this one.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: I just had a question. In Fort Worth, Frank, you tell me if you disagree with this. I think the practice, even if it may be unwritten, is that before an opinion is issued by a three-member panel it's circulated to the other members of the court; and I don't think it goes out without, if there is an objection. Is that your general understanding of how it works?

MR. GILSTRAP: They circulate it. I know that.

MR. DUGGINS: I guess I still have the question do you follow that?

JUSTICE PATTERSON: We circulate to all judges; but not every Court of Appeals does that, I don't think. I don't think it's a wide practice. I know they don't in Dallas; and I don't think in Houston.

MR. DUGGINS: Sarah, do you do that?

JUSTICE DUNCAN: Circulate before the opinion issues?

JUSTICE PATTERSON: No. To all judges.

JUSTICE DUNCAN: Before the opinion issues?

MR. GILSTRAP: Yes.

JUSTICE DUNCAN: Absolutely not.

CHAIRMAN BABCOCK: Not sort of not.

MR. GILSTRAP: Is that "yes, you do" or "don't"?

JUSTICE PATTERSON: Do not, they do not.

MR. GILSTRAP: They do not.

CHAIRMAN BABCOCK: Chris, do want to add anything.

MR. GREISEL: No.

CHAIRMAN BABCOCK: Anything more on this subject? Let me suggest that we not put it off indefinitely; but that we at least put it off until the next meeting, and have Frank and Justice McClure if her clerk gets back either today or whenever follow the Willover case. And if there is something to take up at the next meeting when perhaps we have a little fuller group of people who practice in this area, we'll take it there, but not reach any definitive conclusion today, although I think the discussion has been interesting and would inform what we did in November.

MR. ORSINGER: Chip, and we have a subcommittee that is pretty much entirely constructed of people who are interested in

due practice or teach appellate law. Maybe we ought to ask them to evaluate the different contentions and make a recommendation as a subcommittee.

CHAIRMAN BABCOCK: That's what we did do.

MR. ORSINGER: I thought you were just detailing it to a few people to bring it back here on the table.

CHAIRMAN BABCOCK: Dorsaneo's subcommittee has got it. He just delegated it to Frank to work on it.

MR. ORSINGER: I see.

JUSTICE DUNCAN: Yes. It hasn't been presented to the subcommittee.

MR. GILSTRAP: That's correct. That's correct.

CHAIRMAN BABCOCK: Well, then let's present it to the subcommittee, and just, you know, it's not like in November we're going to necessarily decide anything. We may say that the Court of Criminal Appeals is in fact considering this issue. They, you know, we expect they'll rule in a certain time period and we want to defer it, or it may be the view

of the subcommittees that we ought to go full speed ahead, and we can talk about that then. But anyway, let's put it on the agenda for November 2nd and go from there. Is that okay with everybody?

Okay. Orsinger, I got some e-mails from you yesterday about Rule 103 and 536.

MR. ORSINGER: Well, I think we decided we were not going to debate the issue yet. And there is still another, at least another meeting in the offing. So my subcommittee has no recommendation because we really, unless I'm mistaken, I don't feel like we've been told that it's time for us to make a decision. I think we're still in the information gathering stage.

CHAIRMAN BABCOCK: Tell me what your. I don't know how this got -- I do know how this got on the agenda for today, because at the last meeting somebody, maybe not you, but somebody said we'd be ready to talk about it today. What is your timetable? Do you want it on in November?

MR. ORSINGER: My timetable is that, you know, whenever somebody says that they're

ready to meet and have us hear the contentions. I mean, it's a little ambiguous to me. There's a couple of businesses that do process serving all over Texas who seem to be really interested in this; and it doesn't seem to be anybody else is. And yet I know the second we try to promulgate some kind of standardized rule there's going to be hundreds of district clerks that are upset. So whenever somebody says "Okay, guys, come up with a recommendation" we can do that.

CHAIRMAN BABCOCK: Well, the Court has asked us to look at it; and we had a representative of one of the process servers here last time and we talked about it, and we have a package that had Rules from other states and some material that was sent to us. So are you waiting for somebody to say, you know, "We really want you to talk about this"?

MR. ORSINGER: Well, no.

CHAIRMAN BABCOCK: Justice Hecht sent me a letter on March 28.

MR. ORSINGER: I'll tell you this: My subcommittee is going to meet on this; and if

anybody wants to have any input before the meeting, they better get on it, because I was expecting people to come to me with from outside with proposals that involve practicalities, not just Rule analysis. And so if your feeling is that we have been remiss in not making a recommendation, we will come back with a recommendation. And if anybody wants some input, they better get a fire lit under them.

JUSTICE NATHAN HECHT: This is the Rule that the two legislative committees are looking at too.

CHAIRMAN BABCOCK: Yes. Well, I mean, I frankly don't came other than to fulfill our charge from the Court. So let me ask Justice Hecht what he wants.

MR. ORSINGER: Whatever you tell us to do. If you tell us to go ahead and meet and makes a recommendation, we will.

JUSTICE NATHAN HECHT: I think we better visit with the principals and make sure we're not getting crosswise with the legislative committees before the next, if possible before the next time. I can't imagine they would

want this problem; but if they do, I guess we should consider that fact.

MR. ORSINGER: So we need to probably meet with the staff attorneys for two different legislative committees, three different legislative committees?

MR. GREISEL: It's a single. I think the proposal is a single, unified meeting of whoever you designate of your committee with the civil process servers and members of the staffs of the House Civil Practice & Remedies Committee which reviewed this issue as a preliminary charge or interim charge, House Judicial Affairs Committee, which is still considering this as an interim charge, and the Senate Judiciary Committee hearing whose staff member is interested in that and to determine because there has been a great deal of legislation filed on this particular issue in the preceding 10 years to determine whether this is something that is best handled since the proposal for us initially was a massive licensing and registration system which was never handled by Rule before.

MR. ORSINGER: And no funding.

MR. GREISEL: Right. Whether that should be done as a legislative proposal or at least with legislative understanding, or whether there is a simple Rule attachment. And I think that was the goal that we're trying to accomplish between October the 8th and October, in a three-week window in October.

MR. ORSINGER: Well, I'll designate myself as a representative. Let's get it set early in that time frame, because I've got to synthesize whatever the legislators say and get back with my subcommittee to come up with a recommendation.

MR. GREISEL: And they're looking for it too.

MR. ORSINGER: If we're not able to accomplish that meeting with the legislative interests, Chip, I would suggest that we not try to resolve it by November, because I think this has been a politically contentious situation.

My assessment of it is they failed to get what they wanted from the legislature, so they're now coming back to the Supreme Court to get it done; and I think we should be

sensitive to the politics of it, and we ought to meet with them and have their input before we make a recommendation.

CHAIRMAN BABCOCK: Yes. My only thought is that if the Court tells us to do something, we just do it until they say "whoah." And they haven't said "whoah" yet. So --

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: And when you -- say "whoah" whenever you want. Why don't you just do that, work with Chris. And if it's something we shouldn't take up in November, just call Deborah or call me, and we'll take it off the agenda; but it will be on the tentative agenda for now.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Is that okay?

MR. ORSINGER: That's okay.

CHAIRMAN BABCOCK: Cool. Okay. That takes us to something for Dorsaneo who is not here, and then two things for Pam who was here, but is not here now. And then and she had a concern anyway about whether that was a live issue. Does anybody remember whether the Rule 2 and Rule 6 issues are still? Chris,

one of these is a letter from you.

MR. GREISEL: A letter to me. Yes. The Rule 6 issue deals with whether for purposes -- I thought it was Rule 6. Yes. Whether certain types of procedures could, you could include Sunday as a date, you could execute process on a Sunday. And that is a live issue to the best of my understanding; and I just I know that was assigned.

CHAIRMAN BABCOCK: Yes. My recollection is Pam wasn't here at the last meeting; and I asked somebody on her subcommittee to tell her about it. And the only person who is currently here from that subcommittee would be Bonnie. Chris, would you do that?

MR. GREISEL: Yes.

CHAIRMAN BABCOCK: Make sure that that. So we'll put that for November 2nd and 3rd. What about Rule 2? Do you remember what that one was? Is that a local Rule? Does anybody remember what that was?

MR. EDWARDS: It looks like they're adding in Justice Court.

CHAIRMAN BABCOCK: Is that a Justice Court? Yes. Here we go.

MR. EDWARDS: That's local rules for Justice Courts.

CHAIRMAN BABCOCK: Yes. That may have been something that you-all were doing, Judge Lawrence. It was Rule 2, because that's Pam's subcommittee; but it may have been actually something for you and Elaine.

MR. EDWARDS: Looking at what we have here underlined is the business about the Justice Court.

MR. GREISEL: Right. That was the Harris County, the extension of the law into Harris County.

MR. LAWRENCE: We actually what we did last time was amend those Rule 3(a) and then the Rule 2 under recodification; but they were both sent up last time. So it shouldn't have been back on the agenda this time

CHAIRMAN BABCOCK: Okay. Thank you.

MS. CORTELL: Pam sent out an e-mail on September 27. It says she's unaware of any action to be taken on Rule 3(a) other than it's to go to the court.

CHAIRMAN BABCOCK: Yes. Okay. That takes us to Fulton vs. Finch; and this there

was a misstyle on this. It says it was in Dorsaneo's subcommittee; but it's not. It's in Sarah Duncan's subcommittee. Sorry about that.

Sarah, have you-all met on this, or is this better deferred to next time?

HONORABLE SARAH B. DUNCAN: Well, Chip, are you going to do that tonight?

MR. WATSON: Him Chip, me Skip.

HONORABLE SARAH B. DUNCAN: Skip. Skip. "He Chip, me Skip." I've only done that for 15 years.

MR. WATSON: I was working up a memo on it. I did not know it was going to be on the agenda; and I'm about halfway through it. I can finish it tonight if we can get it typed for tomorrow. Otherwise put it off.

CHAIRMAN BABCOCK: Okay. Well, here is we have a little bit of a decision. I'm a little surprised we got through this whole agenda this afternoon; but it's only because the Chair runs a snappy meeting.

MR. GILSTRAP: It's a good thing.

CHAIRMAN BABCOCK: So the question is the only thing we have left for tomorrow morning

would be that and the little addition to Judge Peeples' finality Rule that Richard is going to stay up all night working on.

MR. ORSINGER: I gave my proposal over there; and I haven't heard back from him.

HONORABLE DAVID PEEPLES: I need two months on that.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE DAVID PEEPLES: I need two months on that.

CHAIRMAN BABCOCK: You need two months on that. Okay. So what is the sense of everybody? Do you want to try to meet tomorrow or not? Sarah Duncan is saying "yes." It's a "yes" vote. Elaine says "yes."

HONORABLE SCOTT F. MCCOWN: To meet tomorrow?

HONORABLE DAVID PEEPLES: For just this?

HONORABLE SCOTT F. MCCOWN: We're further apart philosophically than I thought.

(Laughter.)

CHAIRMAN BABCOCK: Well, it wouldn't be just on that. But Skip says he doesn't want to stay up all night to finish his Fulton vs.

Finch memo.

MR. ORSINGER: Chip, rather than asking who wants to be here tomorrow, why don't we ask who will be here tomorrow.

CHAIRMAN BABCOCK: Well, you know the head table will have to be here if we're here.

HONORABLE SCOTT F. MCCOWN: I move adjournment until November.

HONORABLE DAVID PEEPLES: Second.

CHAIRMAN BABCOCK: Is there strong dissent or not?

JUSTICE DUNCAN: The difficulty for those of us that do not happen to live in Austin or plan to go back to our homes tonight is that it's too late to cancel reservations. And as long as we're going to stay here, why don't we work?

HONORABLE SCOTT F. MCCOWN: Because we don't have anything useful to work on. But let me suggest that the library will be open tomorrow, and you can go do judicial work.

(Laughter.)

JUSTICE DUNCAN: I think Fulton vs. Finch would be a nice, tidy topic.

HONORABLE SCOTT F. MCCOWN: Skip is not

ready right now.

JUSTICE DUNCAN: He can be.

(Laughter.)

JUSTICE DUNCAN: He asked to join my subcommittee.

CHAIRMAN BABCOCK: That's right. As I recall he volunteered.

JUSTICE DUNCAN: That's right.

MR. WATSON: I can get this at home.

(Laughter.)

HONORABLE SCOTT F. MCCOWN: Call the question.

CHAIRMAN BABCOCK: Well, I'm wiling to put it to a vote. I think I know how the vote is going to come out. You know, as Sarah says, I'm here. I'm happy to do it; but it's whatever anybody thinks about it.

MR. WATSON: How about if Sarah and I work on it and talk about it next time?

CHAIRMAN BABCOCK: That's acceptable to me, if it is to everybody else. You're going to stay tonight.

JUSTICE DUNCAN: I feel really guilty.

CHAIRMAN BABCOCK: Don't.

JUSTICE DUNCAN: I do.

CHAIRMAN BABCOCK: All right. Does she have to feel guilty, Justice Hecht?

JUSTICE NATHAN HECHT: (Nod negatively.)

MR. ORSINGER: I vote to let Sarah work through her own guilt rather than have us.

CHAIRMAN BABCOCK: We will see you November 2nd.

(Adjourned 4:43 p.m.)

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SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 28th day of September, 2001, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $_____ charged to Charles L. Babcock. Given under my hand and seal of office on this the 7th day of OCTOBER, 2001.

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Certification 2343
Cert. Expires 12/31/02