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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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Taken before Patricia Gonzalez, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 2nd day of November, 2001, between the hours of 2:28 p.m. and 5:30 p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

CHAIRMAN BABCOCK: All right. We're back on the record. And in keeping with our flexible flexibility scheme, we're going to jump right into en banc court. And Professor Dorsaneo says that this should take us no longer than 15 minutes if we are sane and rational people.

So without further ado, Professor Dorsaneo -- but Luke's got some thoughts about this, too. Don't leave, Luke. Before you go, give us your thoughts about it.

MR. SOULES: Oh, my goodness. I thought if we were going to -- that a way to think about this could be a similar way that the statutes have done with trial judges, and that would be maybe to differentiate between fully retired judges and former judges or defeated judges in how they are treated by their presently-elected and serving brethren on the respective courts.

It may be the reason why some of these people haven't been able to be re-elected or have not -- all the way to retirement; so maybe there's a reason to think about those differently.

That was the only real observation that I had, Chip.

HONORABLE JAN PATTERSON: Any discussion

of this gets into visiting judges, so --

MR. GILSTRAP: Definitely does.

HONORABLE JAN PATTERSON: The whole theory.

MR. SOULES: Right. And I'm saying the visiting judges who are fully retired judges may have a different status -- they do already in the trial practice, than those that are defeated or former judges and not retired judges.

CHAIRMAN BABCOCK: Right.

Okay. Bill.

PROFESSOR DORSANEO: Well, I wasn't here at the last meeting, but I understand Frank made -- did you make the full scale report of the type that's in your September 27th memo?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Full scale and eloquent, I might add.

PROFESSOR DORSANEO: I'm sure it was. The memorandum is good, and I just point out that what we're talking about is Appellate Rule 41.2(a), and I guess we could be talking about 41.2(b) as well -- involves the same issue in a slightly different guise.

Prior to -- look at Frank's memo, if you have it handy. That's what I'm going to be talking

from, just briefly. Prior to 1997, the en banc court consisted of, you know, the membership of the court, in terms of the language or the rule, and the majority of the membership of the court constituted a quorum, the concurrence of a majority of the court being necessary to a decision.

As amended -- and I don't know whether this came through this committee. I'm inclined to think that it did not. Okay? I'm fairly certain that it did not. I see Justice Duncan who is remembering things the way that I'm remembering them, but the rule now reads that the en banc court consists of, you know, members of the court and members of the panel before whom the case was originally argued. Those panel members can be retired or former justices, and that changes the configuration of the en banc court.

There is a statute that deals with this same subject that's on Page 6 of Frank's memo, which says, "When convened en banc, a majority of the membership of the court constitutes a quorum..." The statute, Government Code Section 22.223(b), you know, actually matches the rule prior to 1997 rather than the current rule and some have thought that there is an issue about a conflict between the current rule and the statute.

When I said I thought this was not a complicated issue, you know, I meant that. I think it's a serious issue, but it's not like the detainer rule, something that involves a tremendous amount of complexity. "Who is going to be eligible to be part of the en banc court on rehearing," and I asked the members of the subcommittee to provide me guidance and I got a blizzard of guidance that suggested that there are a lot of different ways to look at this. And I don't think it would necessarily be profitable for me to try to summarize that discussion.

I, frankly, thought that -- as my little e-mail said, that it was an issue that seemed to overstimulate the subcommittee.

(Laughter)

CHAIRMAN BABCOCK: I believe you told them to get a life, too, as I recall.

MR. GILSTRAP: He told us to get out more often.

(Laughter)

MR. GILSTRAP: I mentioned that to someone and they said it was like the pot calling the kettle black.

(Laughter)

CHAIRMAN BABCOCK: The last time we met,

we talked about a case pending before the Texas Court of Criminal Appeals, I think, called Willover, and there was some sentiment that the court was considering this issue and that we maybe should defer -- in fact, maybe that's what Frank's memo said. Is that no longer the case? Is there any reason to defer or should we just jump right into it?

Justice Duncan?

HONORABLE SARAH DUNCAN: Justice McClure researched this. Those issues in the petition were not granted. So I don't think that will be heard by the Court of Criminal Appeals.

CHAIRMAN BABCOCK: Okay. So there's no reason to hold up because of that case?

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Okay. With that being said, let's jump right into it. I don't think you-all proposed any specific language, but I assume that, from the tenor of your comments, you would want to go back to pre-1997.

PROFESSOR DORSANEO: Well, I don't think you can assume that at all. My view is, you know, that I don't have a dog in this fight at all and I would be interested in hearing what the appellate judges would have to say. That would influence me

greatly. What I think influences me hardly at all.

(Laughter)

CHAIRMAN BABCOCK: Judge Brister, not just an appellate judge but the chief.

HONORABLE SCOTT BRISTER: Well, I would propose going back to the old rule for this reason: Most of the courts -- not necessarily the one I'm on, but most of the courts, the question of who are the visiting judges and how many there are on any particular case is entirely up to the chief justice, which leaves the unsavory possibility that on a closely divided court a chief justice could affect -- who was in the minority, could have whatever he or she wants by appointing, on whatever cases were political or big or controversial, appointing one or even three -- 14th Court, we had three visiting judges hearing cases for two years, appoint three visiting judges -- having them hear the controversial case, and, in effect, packing the court on particularly -- en banc is very rare. That's what the rules say it should be. It's only -- it's disfavored. It only tends to be on very close, controversial issues, and I just think the potential for a court packing charge to be raised suggests that it's far better -- I won't even get into the, you know, election of judges and democracy and

all that -- far better to have those cases decided by the elected members accountable to the public for whatever they do rather than charges that the -- insider trading before we got to that point.

CHAIRMAN BABCOCK: Luke, do you recall why the rule was changed? Did it come through this committee?

MR. SOULES: The Supreme Court decided to change it. We were never consulted, that I recall, on that point. I don't remember ever seeing anything, do you, Bill?

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: Just a point of clarification. When you say that there were three visiting judges, Judge Brister, you're not suggesting that the rule, as it now reads, contemplates that all three of those judges would be included in the en banc court?

HONORABLE SCOTT BRISTER: Absolutely, absolutely.

(Simultaneous discussion)

HONORABLE JAN PATTERSON: No, no, no. But if they're not all the panel; so it includes the current sitting judges plus any visiting judges who

might have sat on the panel.

MR. SOULES: And any defeated judges who were on the panel.

HONORABLE JAN PATTERSON: Right, right. But not visiting judges who were not on the panel.

HONORABLE SCOTT BRISTER: No, no. You have to be on the case, but as I said, we've got a hundred cases decided by three visiting judges.

HONORABLE JAN PATTERSON: But part of those comments have to -- and that was a very specific instance where the Houston court had a panel of visiting judges. So that is a -- I mean, apart from the fact that en banc is very rare, Houston is even more rare with their panel of three visiting judges.

HONORABLE SCOTT BRISTER: Well, as far as I'm concerned, 14th Court will never again have a panel of three judges. I just think that's a bad idea. My point is, even if it's just one, a closely divided court, that can make the difference. There's certainly nothing in the TRAP rules or anything else that prevents a chief justice from assigning a very controversial case to three former chiefs.

Do I think that's happened or can I point to any situations where that happened? No, and I hope there never will be. I just think, because of

the potential that that charge is raised, besides the fact that all of the courts, I believe -- except maybe yours -- are currently an odd number of judges. Correct? You-all are four. Right, Jan?

HONORABLE JAN PATTERSON: We're six.

HONORABLE SCOTT BRISTER: Six. Most of them are an odd number. And so if you have, in the more usual case where you have one visiting judge on the panel, what you end up with is the Willover problem, which is, you end up where you have a majority of the elected judges vote one way, but it's a tie vote, five to five, and you have to have a majority to turn the case the other way. And so that makes it also look bad, that the majority of the elected judges vote one way but that is not the way it is, and then, "What's the law and the jurisdiction on that issue?"

CHAIRMAN BABCOCK: Stephen and then Luke.

MR. TIPPS: I think another reason to go back to the original rule -- and I don't know whether there's any basis for this or not, but it's always seemed to me that Courts of Appeals sit in panels rather than en banc routinely, really for kind of the same reason that they sometimes use visiting judges.

And it's just a matter of efficiency and the inability of the court to hear every case en banc.

But in the rare instance in which there is an en banc decision, it seems to me that that is truly, in every sense, a decision of the court. And those kinds of decisions ought to be made by the elected judge to the courts. I mean, there's no reason to do any kind of a shortcut and including visiting judges is a shortcut.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: Well, I wasn't here for the discussion before. And I apologize for being in other meetings at the time, but -- and maybe this was already said. I mean, there's a solid reason for including these people.

I think statistics will show that where visiting judges are on panels, they write most of those decisions. And a lot of times, particularly in San Antonio, at least in the past, the visiting judges have been brought in to do that so that they get some of the opinion writing off of the court.

There may be some headshaking down there, but at least those of us who practice --

(Laughter)

CHAIRMAN BABCOCK: She's shaking her

head yes -- affirmative.

(Simultaneous discussion)

(Laughter)

MR. SOULES: Anyway, now we've brought this person in whose job it is, as long as they write the majority opinion -- they can get one other concurrence or both on the panel -- to reason through the case and work through the case and write a decision and the decision is either full panel or that person is joined by another elected judge, assuming that there's just one visiting judge on a panel. And I think -- at least in the San Antonio court, I've never had more than one visiting judge on the panel. So we always had the majority of elected judges sitting on each panel.

And then the court decides to grant en banc review and this person who's brought in to do this work and done the work and at least got one concurrence in the work is excluded from the process without even an opportunity. And I would think if that person is not going be allowed to participate in the en banc decision, that person is now excluded from the -- all the dialogue about the case, because they're an outsider at that point.

So now they're excluded from the process

of deciding the case and isolated them. It's probably the reason why the rule was adopted in the first place. The people who actually participate in the decision of the panel should have an opportunity to, if you will, defend that decision to the assembled court when it gets en banc review.

And that makes some sense, I think. It may not be the right answer, but it is certainly one way to do it. That doesn't seem, to me, to be distasteful and extends a lot of courtesy to the people that are coming to try to help get the cases decided.

I'm not advocating that. I just don't want it to go without thought.

CHAIRMAN BABCOCK: Frank. Then Sarah.

MR. GILSTRAP: Like Professor Dorsaneo, I don't have a dog in this hunt either -- I don't even have a dog.

(Laughter)

MR. GILSTRAP: But I think -- I am a little puzzled as to why there's so much concern about a visiting judge on an en banc panel when, you know, we have visiting judges that decide cases all the time on a three-judge panel, the two elected judges divide, the third visiting judge decides the case, or an

even-numbered justice court, you have a tie breaker appointed, and that visiting judge decides the case.

If you're going to have visiting judges, they are going to decide the cases. And I don't see why, when it goes en banc, suddenly that's a different situation.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: As Frank says, to take the visiting judge off the court once an en banc motion for reconsideration -- a motion for reconsideration en banc is filed is really to create two classes of judges. And, to me, this is a -- this boils down to, "Are we going to have visiting judges on appellate courts?"

We already have an objection process in the appellate courts to disqualify someone from sitting based upon no reason at all. I think -- I have two dogs, and neither is in this hunt, but --

(Laughter)

HONORABLE SCOTT BRISTER: I have a cat.

(Laughter)

HONORABLE SARAH DUNCAN: But I do think it is -- and I could argue this either way, but I do think it is incredibly unfair to a judge who is coming in to sit on a case. In our court, we don't use a lot

of visiting judges anymore, but when we did, they were brought in expressly to write the opinion. And you bring in this judge and that judge reads the record and reads the cases and writes an opinion -- we don't even give them a law clerk; they have to write the opinion from scratch on their own -- and then we tell them, "Well, you've done, you know, what you've done on this case and now we're excluding you from the rest of the process." I think that's, as I say, a little bit unfair.

I would also point out that on those politically charged cases that Judge Brister was talking about, sometimes the visiting judge is the one judge who's politically immune enough to write what ends up being the correct decision.

Chief Justice Cadena wrote a dissenting opinion in Mata v. State which was ultimately more along the lines of what the Court of Criminal Appeals ultimately adopted.

I don't think this is an easy question, and I think it's ultimately a question of whether we're going to have visiting judges. To have two classes of judges is, to me, a real policy consideration that we need to think very carefully about.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm in favor of not allowing the visiting judges to vote on rehearing. I don't object to them listening -- being on the panel, and I don't really object to having three of them on a panel. But when the court wants to speak its mind as a whole, I don't think that people who are not officially members of the court in the full sense of election and what all should be able to weigh in in a way that outweighs the vote of those who are elected judges.

And although I don't think it came up in this situation, we came close to it in this situation out of Houston where a majority of the elected judges wanted to participate and have input into the outcome of this case, and the law that was promulgated in the writing of the opinion and the participation of the non-elected judges kept them from doing that. And, to me, that's philosophically different from deciding the case at the panel level.

I'm okay with the visiting judges deciding the case at the panel level, because if the full court doesn't want to endorse that decision, they can grant a rehearing and the full court of elected people can take the official position of that court.

But for those appointments to vote to close the mouths of the majority of the elected judges to speak on behalf of the court as a whole, that troubles me, you know, just philosophically.

MR. GILSTRAP: That's why en banc court is different.

MR. ORSINGER: That's why I think en banc is different, because if a three-visiting judge panel does something that the Dallas court or the Houston court won't stand behind, they can always go en banc and overdo it. But if the three judges are thrown into the vote, then the full court can be thwarted, and I don't think it should be. And I think that makes it different from any other judicial event short of en banc reconsideration.

MR. SOULES: If the court only puts one justice -- one visiting judge on a panel, what you're talking about cannot happen. The case has been decided.

HONORABLE SCOTT BRISTER: No, it did happen. That's what --

MR. ORSINGER: Yeah, because the court could split at that point and now you've gone from odd to even and then you've got to appoint another one --

MR. SOULES: Well, if the court splits

three-to-three, doesn't the decision stand?

HONORABLE SCOTT BRISTER: No, no.

HONORABLE SARAH DUNCAN: Yes.

MR. SOULES: Yes, it does. It does.

HONORABLE SCOTT BRISTER: What happened in Willover was, two to one on the panel, visiting judge part of the two. Then it goes to the nine and it was five to five, because the five who wanted to grant and write the opinion differently did not have a majority of the court. So four, plus the visiting judge, were able to leave the decision as it was.

Now, the question is, "Next time, could you get it to come out the other way by appointing a different visiting judge the next time or not" -- you know, "Then what would happen if you do an en banc twice and it comes out different?" I mean, it's just a mess.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: What I'm having trouble with is if we go back to the old way of doing it for en banc, then how do we reconcile the situation such as an In Re Masonite item, I believe it was, where you'd have an appointed judge to the Texas Supreme Court who drives the decision in a five/four decision? I mean, how do we reconcile changing the rule back and

still having that situation in the Texas Supreme Court?

HONORABLE SCOTT BRISTER: The difference -- appointed in a recusal is always different from appointed as a visiting judge, in my view. In the Texas Supreme Court, you don't have visiting judges except in recusals. Right?

JUSTICE HECHT: Right.

HONORABLE SCOTT BRISTER: So that's the end of it. If the judge is recused, that is the court.

MR. GILSTRAP: Bill, you still have the problem about the evenly divided en banc court where you have an even number of judges, like the Austin courts.

HONORABLE SCOTT BRISTER: If you have a judge recused, you come -- no, you don't, because the nine is still nine; one is recused. If you're recused, you're recused for good. You don't come back on rehearing.

MR. GILSTRAP: But in the Austin court, you've got six judges. If they split, they've got to have a tie-breaker. And there's just no way out of that problem.

MR. SOULES: Not on motions for

rehearing. The decision stands.

MR. ORSINGER: No, Luke. It says -- I'm looking at Frank's memo, but it says -- Rule 41.2(b) says you appoint a tie-breaker. You don't just deny the motion for rehearing en banc.

PROFESSOR DORSANEO: The rule says -- and I think that's probably what it means, but I'm not completely certain.

MR. GILSTRAP: Let me bring you up to speed on that. That was how the Houston court dealt with it in the Polasek case, but then there was an interim case called Wilson. In Polasek, they wound up with two tie-breakers. In Wilson, they went over to the mode where they said, "If the court is -- if you don't get a majority of the court, even if it's evenly divided, you don't get en banc." Do you see what I'm saying? So if you have a ten-judge court and it's five to five, you don't have majority; you don't go en banc.

CHAIRMAN BABCOCK: Justice Duncan has got something to add to that.

HONORABLE SARAH DUNCAN: Actually, that's what the Supreme court has held. And Dorsaneo probably remembers the name of the case, or Justice Hecht. I don't. It was a Corpus case.

JUSTICE HECHT: Yeah, a case out of Corpus.

HONORABLE SARAH DUNCAN: And the Corpus court is a six-judge court and the court divided three-to-three on the motion for reconsideration en banc. And the Supreme Court held that in that event there simply isn't a majority to grant the motion and the case stands as it is. So it's -- I mean, that's just the way that is.

PROFESSOR DORSANEO: So what does 41.2(b) mean?

HONORABLE SARAH DUNCAN: It means after reconsideration en banc has been granted, if the court then can't agree on a judgment, a tie-breaker is appointed.

PROFESSOR DORSANEO: Yeah. That's what I thought. It is ambiguous. And I thought it could mean that or it could mean the other matter.

MR. ORSINGER: But the argument is still the same, because, in that instance, aren't you in a situation where the majority of the elected judges would favor rehearing en banc but because of the participation of the temporary judge, it's stymied; and, therefore, by default the rehearing is denied? So again, the will of the majority is overcome.

HONORABLE SARAH DUNCAN: You keep saying "the will of the majority," and I guess that's why I have my fundamental problem. When the Supreme Court appoints a judge to hear a case in our court, that judge is appointed for the case.

And we may have been wrong, but prior to the amendments of 1997, if a judge appointed to the case that heard the case at the panel level, they were on the en banc court as far as our court was concerned, because they were appointed to the case.

So I don't understand this thwarting the will of the majority. The majority is the majority of people that are on the case, and that's everybody that sat on the case.

HONORABLE SCOTT BRISTER: You-all are just disputing the question about the majority of what.

MR. ORSINGER: Yeah. See, I'm talking about the majority of the duly elected judges.

HONORABLE SARAH DUNCAN: I understand.

JUSTICE HECHT: But the other side of that is, the visiting judges are not foisted on the Courts of Appeal. I mean, if they don't want them, they don't have to have them.

MR. ORSINGER: Sure.

JUSTICE HECHT: They invite them in. So, in that sense -- I mean, they're asking for this problem.

HONORABLE SCOTT BRISTER: As a practical matter, we have to have them. Because unlike the Supreme Court or the Court of Criminal Appeals, we can't say, "No, we don't like that. We don't want to fool with those cases." We have to write on all of them.

We haven't had any new judges in 20 years, and we're not going to get any new judges. So as -- now, let me just respond to a couple of things.

I certainly don't mean my wanting to go back to the old rule to suggest second class citizenship status for visiting judges. We will continue to use visiting judges. They're valuable, smart people; plenty of experience.

They're always different, in that in a civil case you can boot them, which you cannot do to an elected judge. That's just the statute, and everybody's always -- according to some legislators, you ought to be able to boot them in all cases. According to Johnny Holmes, you ought to be able to boot them in criminal cases.

They're controversial because they are

different. They are not elected, and that -- in a democracy, that makes a difference. It doesn't make them lesser intellects or lesser persons; it gives them a different status. And so the question is -- just a fair one, "What should that status be on en banc?"

Second, en banc is very rare. As a matter of practice, it's never granted unless you're going to do something different from what the panel did. There are a few of us, like me, that think granting en banc is a good idea just so you can think about it. But make no mistake about it, all of my colleagues believe, if you agree with the majority, you don't vote for en banc. If you agree with the dissent, and there is almost always a dissent -- I cannot think of any instance where there has not been a dissent that en banc was granted, which means the person who's going to write for the court is whoever wrote the dissent.

Now, whether we should keep the visiting judge on to change his or her former majority into a dissent because we hate to lose their experience or something, I'm not overwhelmed that we need them to help write the new dissent. The person who's going to write for the court, as a practical matter, is going

to be who wrote the dissent on the panel, and that's going to be the voice of the court. And we don't need to add the visiting judge back in the mix because we're going to vote against it.

MR. SOULES: What if the visiting judge was at the center?

HONORABLE SCOTT BRISTER: If the visiting judge was the only dissent -- well, if the visiting judge was by him or herself as the dissent, I am -- I would say the chance is a million to one that the court would grant en banc in that case, because, of course, the fact is, you've got to get a majority of the court without the visiting judge's help to, say, go the other way.

So I just think it's -- my experience, and I hear from some of the other appellate judges, it always happens -- rehearing en banc -- en banc cases are always going to reverse the panel decision. Can you-all think of an instance where it hasn't?

HONORABLE SARAH DUNCAN: We frequently have en banc decisions that don't reverse. We have a lot of en banc decisions. It's not rare in our court.

HONORABLE SCOTT BRISTER: It's supposed to be, is what the rules say.

MR. SOULES: No, it's not.

HONORABLE SARAH DUNCAN: No.

HONORABLE SCOTT BRISTER: The rule says it is. That's what 41.2(c) says.

HONORABLE SARAH DUNCAN: It just depends on how often extraordinary circumstances or unusual circumstances come up. It doesn't say that there's an absolute number. It's a relative thing.

I would also like to point out that because it's been, I think, partially stated in e-mails and memos and opinions, that it's true that the Fifth Circuit -- the FRAP rule says that it's only the judges in active service who sit on the en banc court, but the Fifth Circuit -- Local Rule 35 says, "The en banc court shall be composed of all active judges of the court plus any senior judge of the court who participate in the panel decision who elects to participate in en banc consideration."

I think -- I would say I didn't help write this rule, but I wonder if one of the reasons for that Fifth Circuit variation is because you don't want to lose the input of someone who was on the panel.

MR. SOULES: Is that just senior judges from the Fifth Circuit or does that include trial judges?

HONORABLE SARAH DUNCAN: It says "senior judges of the court."

MR. SOULES: Of the Fifth Circuit Court?

HONORABLE SARAH DUNCAN: But I'm not sure that that's not -- if a senior judge from another circuit comes to sit on the panel.

MR. SOULES: I'm just wondering if that would include trial judges who sometimes sit on Fifth Circuit panels.

MR. WATSON: It doesn't sound like it does.

JUSTICE HECHT: The statute says any -- "except that any senior circuit judge of the circuit shall be eligible to participate at his election and upon designation and the same," and so on, "in the decision of the case."

CHAIRMAN BABCOCK: What about Luke's question, though, district judges?

MR. GILSTRAP: So the district judge who's on the panel doesn't sit on the en banc court?

JUSTICE HECHT: This is 28 U.S. Code, Section 46.

MR. WATSON: That's interesting, because you're as likely to draw a district court judge sitting on the Fifth Circuit panel as you are to draw

a senior judge.

MR. GILSTRAP: But they don't go en banc?

MR. WATSON: They do not.

HONORABLE SARAH DUNCAN: See, we don't have senior judges. We treat, in some respects, our visiting judges as though they were a sitting judge.

CHAIRMAN BABCOCK: What about the fact that the statute seems to -- according to Frank's memo, it says it conflicts, but --

MR. GILSTRAP: Well, let me say this. That gets into the issue of whether or not the court had the power to make the rule in the first place, which is complex. And, frankly, I think we ought to defer that until we figure out the policy issue; otherwise, I tend to get lost, if we try to deal with both issues at once.

I mean, I think we ought to decide the policy issue first. And then if we decide to keep the present rule, then we at least have to look at the possibility of whether or not the reporting seat has rulemaking power. That would be my suggestion.

CHAIRMAN BABCOCK: You know, we can consider it anything you want. But if I'm voting on this thing, it's going be important to me to know

whether or not we're conflicting with a statute.

Justice Hecht, before you got back, I asked Luke whether he was aware of why the rule changed in '97 and --

HONORABLE JAN PATTERSON: He blamed it on the Supreme Court.

(Laughter)

CHAIRMAN BABCOCK: Specifically on Justice Hecht as I recall, but --

(Laughter)

CHAIRMAN BABCOCK: We couldn't remember in this committee that it came through this committee. Do you remember why the court changed it?

JUSTICE HECHT: I don't have a specific recollection other than there wasn't any disagreement on the court at the time that everybody who participated in the decision in the first place ought to keep on participating -- any more complicated than that. And we just thought from an efficiency -- from an economic point of view, when we knew that there were going to be -- there were probably going to be panels of two or three visiting judges in some Courts of Appeals helping on the backload -- on the cases that backed up, that it just wasn't going to work to have those three judges go in and decide cases and

then have the court come in behind them and take them all en banc.

It was not a -- we didn't have a long policy discussion about elected versus non-elected or any of the things we've had today. We just thought it was more efficient to have the same people that decided the case in the first place decide the case on the end.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: It's been a long time since I did criminal appeals, but when I first started practicing law, the Court of Criminal Appeals, I think, consisted of three judges and six commissioners. I don't know if any of the old timers --

(Laughter)

MR. ORSINGER: I believe that that's right.

MR. SOULES: That's right. That's right.

MR. ORSINGER: Isn't that right?

MR. SOULES: That's right.

MR. ORSINGER: I think that there was a right to -- I mean, in every instance, the three elected members of the Court of Criminal Appeals had

the final say so on whether the opinion written by the commissioners -- I mean, Luke, do you remember? How did that break down?

HONORABLE SCOTT BRISTER: Is that when Grover Cleveland was president?

(Laughter)

MR. SOULES: That's when Chief Justice Calvert was chief. It was in the late '60s.

MR. ORSINGER: I think it was still -- I may be wrong. I think it was still in the '70s.

MR. SOULES: I don't remember what authority the three judges had over the commissioners.

(Simultaneous discussion)

MR. SOULES: The Supreme Court would either, "judgment adopted" or "judgment approved" or "opinion approved" that worked for the commissioners that were there for a while.

MR. ORSINGER: But the commissioners never voted. Commissioner A or B never voted on whether their opinion was adopted or approved by the Supreme Court. Right?

MR. SOULES: I don't know that. I wouldn't think so, but --

MR. ORSINGER: I don't believe they did. So, I mean, we have precedent that -- pardon me?

JUSTICE HECHT: No, but they got mad as hell if the Supreme Court --

(Laughter)

JUSTICE HECHT: I mean, that was one of the reasons it went to a nine judge court, was because commissioners got to saying, "Why are we sitting here doing all of the work and those three guys get to vote?"

HONORABLE SARAH DUNCAN: There, at least, you do have a statutorily recognized two classes of judges' system. You've got a commissioner who doesn't get to vote and a supreme court justice who does. And, you know, if we want to revamp the whole visiting judge system so that we have commissioners who travel around the state and help out with case loads and justices who get to vote, that's one thing, but we're talking about engrafting this onto a system where supposedly they are a judge of the court for purposes of that case.

MR. ORSINGER: I know that -- I'm not advocating that we revamp the whole system. I say that the decision of the court to speak with one voice on a case is a very important and unique event. And I don't think that the voice of a majority of the elected judges should be quitened or stilled or

they're denied the opportunity to speak and write by the vote of people who are not official members of that court in the elected sense.

HONORABLE SARAH DUNCAN: They're not. As demonstrated by Justice Taft's dissent, the minority, who happens to be a majority of the elected judges, have the same right as any other judge in the court to write dissenting opinions or denial of rehearing en banc.

MR. ORSINGER: Well, unfortunately, what they say isn't precedent and it doesn't affect the outcome of the case. So there is some functional difference.

HONORABLE SARAH DUNCAN: I think it would have a tremendous effect on whether the case is -- whether the petition is granted by the Court of Criminal Appeals or the Supreme Court.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: It looks to me, in this situation, that if you had two distinct groups of people who might not be irritated by whatever the rule is or who will be highly irritated by being excluded or not being given the right status, given the fact that they are, you know, elected members of the court, the efficiency angle makes good sense. But the reason

why I thought this issue, you know, an important issue doesn't involve the same kind of considerations as some others is that we can talk about this until the world looks flat, but it kind of still stays pretty much in balance, you know.

CHAIRMAN BABCOCK: Well, good point. So why don't we --

MR. GILSTRAP: Why don't we go on to the second issue, then. You know, there is the issue of the validity.

MR. SOULES: Why don't we vote on the policy, Frank?

MR. GILSTRAP: And the question is: Do we vote on the policy first and then consider validity or consider validity before we vote on the policy?

CHAIRMAN BABCOCK: Yeah, but the court has sort of spoken on validity, because they voted on it, and there's a way to interpret this, I suppose, to say that membership of the court consists of whoever gets appointed to hear cases.

MR. GILSTRAP: You're right. But in Willover, the court didn't vote on it. In other words, Justice Taft dissented from the denial of en banc consideration, and that -- in other words, that issue has not been decided as to whether or not the en

banc rule exceeds the rulemaking power of the court. Justice Taft says it does, but he was just dissenting.

CHAIRMAN BABCOCK: Yeah. Okay. Well, I see your point, but I think we ought to vote on the policy, whether or not -- and it seems to me that we've got two pretty good go-bys here. One is the pre-'97 rule that reads "Where a case is submitted to an en banc court, whether a motion for rehearing or otherwise, a majority of the membership of the court" -- curiously it's the same language as the statute -- "shall constitute a quorum and a concurrence of a majority of the court sitting en banc shall be necessary to a decision." That almost precisely tracks the statute. That's pre-'97.

And then post-'97, "An en banc court consists of all members of the court who are not disqualified or recused. And if the case was originally argued before or decided by a panel, any members of the panel who are not members of the court but remain eligible for assignment to the court."

So that's kind of the two choices. Everybody who is in favor of pre-'97, raise your hand.

Dorsaneo, you've got to vote.

HONORABLE SARAH DUNCAN: No, we don't have to vote.

(Laughter)

CHAIRMAN BABCOCK: All who are in favor of the current rule.

HONORABLE SARAH DUNCAN: I don't want to vote, because I think it's a pure policy question.

CHAIRMAN BABCOCK: Okay. With some members abstaining, the vote is 11 for pre-'97 and 4 in favor of the current rule.

Sir?

PROFESSOR DORSANEO: This gets me back 41.2(b) which I read on its face as arguably being ambiguous. But 41.2(b), the way it's been construed, I guess, means that there are two decisions. One is to rehear it, and then is to "What are we going to do?" Okay? And I could split that in two in the context of who the members of the court would be.

In other words, maybe we could have -- and this might not be worth it, but just a possibility -- have the decision made by a larger group whether to rehear it or not. And then the ones who vote on what the law is going to be, be the elected members of the court, or even vice versa.

MR. ORSINGER: The second vote will never occur, Bill. If you allow the judges who are appointed for the case only to vote against rehearing,

they will, and you'll never have your second vote.

PROFESSOR DORSANEO: Well, that may well be. That makes me wonder why 41.2(b) is there at all.

MR. SOULES: Why don't we give the visiting judge half a vote?

(Laughter)

MR. GILSTRAP: Bill, it's there -- it's still there for the evenly divided, even member court. Do you see what I'm saying? The six judge court, you still need the tie-breaker.

PROFESSOR DORSANEO: For when four out of the six decide they want to do something but then they can't decide what to do?

MR. GILSTRAP: No. When it's divided three-to-three.

HONORABLE SARAH DUNCAN: We had a case in our court -- we're a seven judge court -- where we had three people that favored one judgment and three people that favored another judgment and one judge who was recused and we had to have a judge -- a majority of the court voted to hear the case en banc, but a majority of the court couldn't agree on what the judgment should be -- actually, it was a two-one-two.

PROFESSOR DORSANEO: Give me the numbers as to how that works, Sarah.

HONORABLE SARAH DUNCAN: Okay. We had two to affirm, two to reverse and render and one who -- no. I'm sorry. There were two who would affirm the actuals but reverse the punitives, two who would reverse and render the whole thing and one who would reverse -- who would affirm the whole thing.

PROFESSOR DORSANEO: So you had how many that voted for -- to rehear it?

HONORABLE SARAH DUNCAN: Oh, I think we probably had seven.

PROFESSOR DORSANEO: But then it was three-to-three after?

HONORABLE SARAH DUNCAN: It was a jurisdictional question and there were -- two members of the court who thought there was jurisdiction, affirm the actuals, reverse the punitives; one member of the court who thought there was jurisdiction, affirm the entire judgment; and three members of the court who believed there was not jurisdiction and the whole thing should be dismissed.

We had to have another judge, and it turned out, we had to have another two judges appointed in order to get a majority in favor of any one of those judgments.

CHAIRMAN BABCOCK: That's too hard.

(Laughter)

HONORABLE SARAH DUNCAN: I don't think it's ambiguous. I think the whole glean is, not that they can't agree on how to act on the motion, but they can't agree on the precise judgments that's to be rendered in the case.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I won't speak in favor of the current rule, since we just had a vote. However, I do want to point out the ambiguity in the current rule. The old rule says that you define an en banc court by when the case is submitted; the current rule does not speak to the time, definition of when you measure the en banc court, so that is it at the time of the en bancness or is it at the time the case is submitted? And I think the courts deal with that problem in different ways, and in flexible ways.

HONORABLE SCOTT BRISTER: No, we had that on the first court, my brief tenure there, and Murray Cohen convinced us -- and I don't remember what it was, but if you were not a judge at the time the case was submitted, you did not get to vote on rehearing.

HONORABLE JAN PATTERSON: That's my

interpretation, but that's not --

HONORABLE SCOTT BRISTER: That's not uniform.

HONORABLE JAN PATTERSON: I don't think that's uniform.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: There's one sentence -- and I'm trying to understand this, but this is not something that comes up very often from a practicing lawyer standpoint, let alone an academic lawyer standpoint.

But in (c), it says, the next to the last sentence, "If a vote is requested and a majority of the court's members vote to hear or rehear the case en banc" -- it does talk about a majority of the court's members. Is that different from who's in 41.2(a) or -- and if it's different, is it meant to be different?

HONORABLE SARAH DUNCAN: Can you say that one more time?

PROFESSOR DORSANEO: Well, en banc consideration disfavor, "A vote to determine whether a case will be heard or reheard en banc need not be taken unless the justice of the court requests a vote. If a vote is requested and a majority of the court's

members vote to hear or rehear the case en banc" -- now, reading that, it looks like that's elected, arguably.

Well, it needs to be changed, if it's not, given the change in the language in the first part. Right?

MR. GILSTRAP: No. You see that -- with the current rule, that's a problem. With the current rule, if you read that to say "court's members" to mean "members of the court," under the old rule, that's a problem. But if we go back to the old rule, which we voted to do, it's not a problem.

HONORABLE SCOTT BRISTER: Same.

MR. GILSTRAP: They're the same.

PROFESSOR DORSANEO: I'm not making myself clear -- is there an inconsistency between the verbiage used in (c) and what is defined as the en banc court in (a)?

MR. GILSTRAP: There is, under the current rule, possibly. No one has ever raised that. But if we go back to the old form --

PROFESSOR DORSANEO: There won't be.

MR. GILSTRAP: -- there won't be. Now, it's implicit in all of this that we're saying that a majority of the membership of the court in the old

rule and the language down here, "the court's members," means elected members. I mean, that's implicit, but I don't think the court has ever really said that.

PROFESSOR DORSANEO: But you could read this rule to say that the vote for en banc is elected members and then how it comes out includes everybody.

MR. GILSTRAP: I see. Yeah, you could.

PROFESSOR DORSANEO: Because that's what it seems to say.

MR. TIPPS: Though that is not the way the first court apparently interpreted the statute in the Willover case, which is not to say that they're necessarily right.

PROFESSOR DORSANEO: Right. I'm commonly not impressed by a result reached in a different case.

MR. GILSTRAP: Steve, I don't think they really interpreted the term "court's members" down there. I don't think they actually construed that particular language in 41.2(c).

MR. TIPPS: But they let the visiting judge vote on whether or not to grant rehearing.

MR. GILSTRAP: That's right. That's right. But they were looking at 41.2(a), I think.

MR. ORSINGER: Inasmuch as we are all aware of the fact the Supreme Court is not bound by our vote, we probably ought to discuss the pro and con of whether the statute requires us to use the old language and not the new, because there are some views about that around the room.

CHAIRMAN BABCOCK: Well, okay. But --

MR. ORSINGER: Just as a matter of making the record, I mean, I'm suggesting that simply because some justices may want to look at the debate, and we have, basically, avoided discussing the statute because we voted on policy, but the statute is a factor if you don't agree with the policy.

CHAIRMAN BABCOCK: Okay. Good point. We did vote on policy. It was 11-4. Let's talk a little bit about the statute. The statute in the pre-'97 rule track each other pretty carefully, or closely anyway. So what does everybody think about whether or not the current rule perhaps run afoul of the statute?

Bill.

PROFESSOR DORSANEO: Well, all I know is, the last time I argued that a rule could be harmonized with some statutory language, it would seem to be the opposite. Even though it was a rule

promulgated by the court, the rule was actually meant to clarify the statute by giving it a slightly different slant; not one member of the court was willing to accept that view.

(Laughter)

PROFESSOR DORSANEO: They were going by the language of the statute. And it's, you know, plain meaning without some sort of an attempt to have it made, perhaps, better sense in context.

CHAIRMAN BABCOCK: So based on that experience, you would --

HONORABLE JAN PATTERSON: So they are not moved by one case either, Bill.

(Laughter)

PROFESSOR DORSANEO: Well, if it's theirs, they might be.

(Laughter)

PROFESSOR DORSANEO: What I'm saying is, I think that you could come to the conclusion that the statutory language was not necessarily inconsistent, and the statute doesn't need to be listed as repeal and this could be just fine working together, but I think that's entirely up to the court and how the court thinks about this question.

CHAIRMAN BABCOCK: Orsinger's point,

though, is that the court wants to hear your wisdom on it, not to read -- that they're smart enough to figure it out on their own. So what's your wisdom on this?

PROFESSOR DORSANEO: Well, I think the statutory language could mean the same thing as 41.2(a).

CHAIRMAN BABCOCK: The current version? You could harmonize the statute with the current version.

PROFESSOR DORSANEO: And I think in jurisprudence, generally, the tendency would be on the one hand to say that -- and perhaps this would be more aggressive than the court wants to be -- on the one hand, that a procedural rule is procedural and within the rulemaking power. And on the other hand, in more practical terms, the sensible thing to do is to harmonize and not seek conflicts where you don't really need to see them.

CHAIRMAN BABCOCK: What about the fact that the prior rule tracked the language of the statute and now they've changed it?

PROFESSOR DORSANEO: Well, this was just a clarification, then, wasn't it?

CHAIRMAN BABCOCK: What?

PROFESSOR DORSANEO: This was just a

clarification, then, wasn't it?

CHAIRMAN BABCOCK: That would be the argument.

Skip.

MR. WATSON: Well, I'm just curious if it's even appropriate to ask if, when the court changed it in '97, if it even came up that the '97 version -- pre-'97 version tracked the statute, or did that just slip by of somebody saying, "Wouldn't it make more sense to do it this way," and no one picked up that it was based on a statute?

If it was discussed in '97, I'm not interested, in here, telling people who made a conscious decision to vary if we don't like it. I mean, they made the decision. It's their call.

CHAIRMAN BABCOCK: Well, Chris wasn't there at the time, so he's absolved of any involvement. And since every single judge in the court has turned over since '97 --

(Laughter)

CHAIRMAN BABCOCK: Except for Hecht.

(Laughter)

JUSTICE HECHT: Well, no, we were aware of the statute, but, again, I don't think -- we didn't have a lengthy debate about this, as I recall. Again,

it was just --

HONORABLE SCOTT BRISTER: Had a whole set of FRAP rules to discuss at the time.

JUSTICE HECHT: Yes, although we did focus on this rule because there's always, in every appellate system, consternation over en banc rehearings. I mean, it just -- in the federal system, there's articles -- Ken Starr wrote an article one time about why you shouldn't have them. The other side of his court, at the time, wrote an article about why you should.

You have to understand the internal judicial politics of court, but people who have made a decision don't like being told they were wrong by their colleagues. I mean, it's just -- I mean, it just causes all kinds of friction.

But truly, the discussion in our court was just mostly about the efficiency of having the people who participated in the decision stay with it.

CHAIRMAN BABCOCK: Frank Gilstrap.

MR. GILSTRAP: Professor Dorsaneo was absolutely right, you certainly could harmonize the phrase "a majority of the membership of the court." You could read that to include visiting judges. But Justice Taft didn't read it that way, and, apparently,

the committee didn't read it that way, because we just voted to reinstitute that language and for that language to mean elected judges only.

Now, if that language means elected judges only, an it's in the statute, then there definitely is a conflict between the statute and the current rule. And, you know, the question is: Of course, the Court of Criminal Appeals could repeal the statute, if, A, they repealed it, and, B, it was in their power. And that gets the question of whether or not this is an amendment that "abridges, enlarges or modifies the substantive rights of the litigants."

I don't know what that means. And the more I read the cases, I'm not sure anybody knows what it means. It means something more than basic due process rights, but it certainly doesn't mean only procedural rights. These are rules of procedure.

This earlier case, Polasek, the Court of Appeals in that case said that the amendment to the court reporters rule that was passed in '97, I think, which changed the rule from the fact that you always get a court reporter unless you waive it to you don't get a court reporter unless you ask for it, that that rule exceeded the rulemaking power of the court, because it enlarged or modified the substantive rights

of the litigants. And I don't know what that means.

What I think we can do is just -- what I want to do is just duck the problem by saying, "We'll go back to the old rule, and that means elected judges," so it doesn't come up. But as Richard points out, the Supreme Court may not buy that.

CHAIRMAN BABCOCK: Well, in the spirit of Richard's -- let's give the court some advice. Do you think that the current rule is in conflict with the statute? Notwithstanding the fact that, you know, a skilled lawyer could come up with an argument as to why --

MR. GILSTRAP: If the phrase "majority of the judges of the court" means elected judges, it definitely is.

(Laughter)

CHAIRMAN BABCOCK: Well, but that somewhat begs the question, doesn't it?

Okay. Yes, Justice Duncan.

HONORABLE SARAH DUNCAN: It's sort of like I was saying earlier, when the courts order appointment, it says that this judge is appointed to the case.

CHAIRMAN BABCOCK: Becomes a member of the court.

HONORABLE SARAH DUNCAN: Then I think he becomes a member of the court for purposes of that case. Otherwise, you don't -- you're going to have terrible problems with confidentiality and everything else.

CHAIRMAN BABCOCK: All right. Just so we can give the court a sense of how people come down on this, how many people think that the current rule is not in conflict with the statute? If you believe that, raise your hand.

Not all at once now.

(Brief Pause)

CHAIRMAN BABCOCK: How many people think it is in conflict with the statute?

(Brief Pause)

CHAIRMAN BABCOCK: So 10 believe that it is in conflict and 7 believe that it is not. So the court now has the collective wisdom of our --

(Laughter)

CHAIRMAN BABCOCK: And we could appoint three visiting members to this group to make it tie, but --

(Laughter)

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: When we only voted

before, we only voted as to whether or not we should have the pre-'97 version or the post-'97 version. We have never voted on whether or not we want visiting judges to participate.

(Laughter)

MR. GILSTRAP: Boy, don't you hate lawyers.

CHAIRMAN BABCOCK: As Frank said, the premise of the vote was that the pre-'97 rule prohibited visiting judges from participating; otherwise, why amend it to provide that they could. But we can take another vote, although we've lost a few people here.

HONORABLE DAVID PEEPLES: Aren't they given that right by statute? I mean, it's authorized by statute, isn't it?

CHAIRMAN BABCOCK: To vote en banc?

HONORABLE DAVID PEEPLES: Are you talking about to even serve on appellate courts?

CHAIRMAN BABCOCK: No, no, no. He's say to vote en banc.

Unless somebody wants to call for another vote, I think --

HONORABLE SARAH DUNCAN: Maybe I'm missing something. Is someone aware of a case that

holds that the pre-1997 amendment version of the rule is properly interpreted to exclude visiting judges for motions for reconsideration en banc or reconsideration en banc? I'm not aware of such a case.

MR. GILSTRAP: I'm not aware of a case either way. That's the problem.

HONORABLE SARAH DUNCAN: But we are aware, I think, of what the Supreme Court's order of appointment says.

CHAIRMAN BABCOCK: Was the sense -- maybe it was my fault for not being clear. Was it the sense of our 11 to 4 vote that people who are voting -- the people on the 11 side were voting to exclude visiting judges from en banc consideration? Is that fair to say? Everybody is nodding their heads.

So in terms of the courts reading this record, it's the sense of the 11 people who voted for the pre-'97 rule that we are interpreting that as excluding visiting judges from participating in en banc consideration.

Does anybody disagree with that -- any of the 11 disagree with that?

(No verbal response)

CHAIRMAN BABCOCK: Nobody disagrees. So

I think we're done with this issue.

Now, Justice Duncan and Judge Peeples, do we want to talk about finality? And can I tell a personal story -- recent story.

HONORABLE SARAH DUNCAN: Only if you agree that we're not going to go talk about finality. That's not supposed to be on the table.

(Simultaneous discussion)

MR. GILSTRAP: You don't want to bring up finality.

CHAIRMAN BABCOCK: Well, it's on the agenda.

PROFESSOR DORSANEO: Finality will be stuck on stop here.

MS. SWEENEY: I want to hear the personal story.

CHAIRMAN BABCOCK: I still want to tell my story, though.

PROFESSOR DORSANEO: You sound like all my students. They always want to here stories.

CHAIRMAN BABCOCK: Yeah. Okay. Here it is. Federal court, not in Texas, four defendants. Two defendants granted summary judgment. The third defendant settles. The fourth defendant fails to show up for trial and is defaulted and there's a default

judgment as to that defendant entered. Okay? Do we have a final judgment in federal court?

PROFESSOR DORSANEO: Oh, we didn't know we were going to get tested on this story.

(Laughter)

CHAIRMAN BABCOCK: Well --

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: I would say no because --

HONORABLE SCOTT BRISTER: Chip, Chip, that's a personal story?

(Laughter)

CHAIRMAN BABCOCK: Hey, I don't have much of a life.

(Laughter)

CHAIRMAN BABCOCK: I would say no because Rule 58 requires a single piece of paper saying final judgment and disposing of all of the parties, but this -- and so I called the clerk and said, "Hey, we're going to get a piece of paper," and they said "Huh-uh, that's not the way we do it."

JUSTICE HECHT: No. As I understand --

HONORABLE JAN PATTERSON: So the punch line was that you had a final decision?

CHAIRMAN BABCOCK: No. We're having it go off the last order which disposed of the last defendant. And there's a period of about 60 days in between these various orders.

MR. GILSTRAP: So you were thinking about finality, weren't you?

CHAIRMAN BABCOCK: Yeah. I was thinking about finality.

JUSTICE HECHT: Well, as the Federal Rules Committee understood the rule, any time a clerk thinks it's final, it's final.

(Laughter)

JUSTICE HECHT: If the clerk makes a docket entry that says, "Final judgment rendered," that's it. And there's a separate sheet of paper. There has to be a separate sheet of paper.

CHAIRMAN BABCOCK: Yeah. Well, we don't have either of those things.

JUSTICE HECHT: Because it can't be an opinion or any other kind of --

PROFESSOR DORSANEO: Federal court -- in my experience, federal courts likes that a lot, because the rule kind of is whatever they say it is at the moment, regardless of what it says in the book.

CHAIRMAN BABCOCK: Well, as the prudent

lawyer, if the clerk tells me that, "As far as the judge is concerned, it's final," then we'll just go do what we've got to do based on that date.

So anyway, we're not going to talk about finality anymore here. It's on the agenda, you know. Sarah says no. David, you don't want to talk about it anymore?

PROFESSOR DORSANEO: We might could do Fulton v. Finch.

CHAIRMAN BABCOCK: Well, we're going to do that for sure.

HONORABLE SARAH DUNCAN: 306a.

CHAIRMAN BABCOCK: Right. Can we talk about that?

HONORABLE SARAH DUNCAN: I'm happy to talk about that, but --

CHAIRMAN BABCOCK: Not finality.

HONORABLE SARAH DUNCAN: When I saw the order for appealability in the materials, I called -- e-mailed Deborah, and I said, "No, never, never again."

(Laughter)

CHAIRMAN BABCOCK: Well, that's why she jumped on it, you know.

Okay. Rule 306a then. Who wants to

talk about that?

HONORABLE SARAH DUNCAN: David, did you want to do 306 first?

HONORABLE DAVID PEEPLES: I rewrote that summary of existing law in Rule 306 that I did the last time and e-mailed it around. It's over there on the shelf. I don't know if we want to talk about that. I tried to do what Richard Orsinger suggested and talked about agreed judgments and family law divorce decrees.

HONORABLE JAN PATTERSON: October 31 draft?

HONORABLE DAVID PEEPLES: Yeah.

CHAIRMAN BABCOCK: Richard -- where did he go? Not here. Has everybody had a chance to look at this?

(No verbal response)

CHAIRMAN BABCOCK: You're talking about the one that says "new language in italics"?

HONORABLE DAVID PEEPLES: No, no. This came out -- I think it was e-mailed around two days ago and at the top it says, "Proposed Changes to Rule 306, October 31 draft." It's one page, 14 lines, and there are a bunch of them over there on the far right.

CHAIRMAN BABCOCK: Okay. Comments on

this?

HONORABLE DAVID PEEPLES: And I don't know if we're going to spend a lot of time on it, but this is -- I was just trying to deal with the divorce decree and agreed judgment issue. I don't know if it's -- I don't know where we stand on this.

CHAIRMAN BABCOCK: And this was because Orsinger wanted it. Right?

HONORABLE DAVID PEEPLES: Well, Richard made a very good point, that -- and he's not here -- that we have had this whole discussion primarily because of summary judgments.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: I've got some research here that shows, in the State of Texas, summary judgments account for .7 of one percent of dispositions, and the problems are caused by a fraction of that .7 of one percent. And yet, we're talking about changing the rules to deal with that and the other 99.3 percent is out there.

And the figures also show that roughly two-thirds of the cases -- the civil cases in Texas are family law. And so Richard's point -- and it's a pretty good point -- is that we need to know what we're doing if we're going to change the rules and

impact two-thirds of the civil litigation in Texas in order to try to deal with a fraction of .7 of one percent.

And so, on Line 5, I added divorce decrees and agreed judgments that are presumed to be final -- "presumed" is the only thing. See? And then on Line 7, it needs to be -- I would say "any other judgment or order is final." I didn't change "and," and I meant to.

But this -- I just tried -- I thought we had agreed on those changes at the last meeting, or something like that.

CHAIRMAN BABCOCK: It's just a matter of drafting.

Yeah, Bill.

HONORABLE DAVID PEEPLES: Yeah.

PROFESSOR DORSANEO: Now, I hesitate to say anything, but you mean divorce decrees -- something that says, "I am a divorced decree" -- "Divorce Decree" on top?

HONORABLE DAVID PEEPLES: They usually say "Divorce Decree" or "Decree of Divorce."

CHAIRMAN BABCOCK: Yeah. Almost always do.

PROFESSOR DORSANEO: And agreed judgment

is going to say "Agreed Judgment"?

HONORABLE DAVID PEEPLES: Well, no. A lot of times they don't. A lot of times, there really is an agreement -- and I haven't gotten to this -- and it says "Take Nothing Judgment" or "Order of Dismissal" or something like that. And inside the body of it, it will say that they reached a settlement and so forth. I don't know how we deal with that.

PROFESSOR DORSANEO: I think it's less likely that somebody would argue that when it says "Divorce Decree" or "Decree of Divorce" that it's really some sort of a partial order, but agreed -- no -- you know, agreed judgments kind of depends upon whether you come to the conclusion that that's what this thing is even though it may not have that title. It may just say "Order" or --

CHAIRMAN BABCOCK: Or it may have that title and not dispose of all of the parties' claims.

HONORABLE DAVID PEEPLES: But here's the thing. A lot of the divorce decrees and regular judgments that we sign have language in the body that says, basically, the thing has been settled. And then they're approved as to form by everybody.

Now, when that happens, it ought to be over, unless there's language indicating something is

left pending.

JUSTICE HECHT: I assume you mean "agreed by all parties."

HONORABLE DAVID PEEPLES: Yes.

JUSTICE HECHT: So that if it was just an agreed judgment between some of the parties, which does happen --

HONORABLE DAVID PEEPLES: Sure.

JUSTICE HECHT: -- that wouldn't --

HONORABLE DAVID PEEPLES: Chip, we may need to let this percolate and think about it. I just sent this around. It was my effort to try to do what we said we wanted to do the last time.

CHAIRMAN BABCOCK: You want to percolate it until the next meeting or until tomorrow morning or when?

HONORABLE DAVID PEEPLES: Well, we have spent a lot of time on this at the last several meetings and I think a lot of people don't have the stomach for it. Something new and more interesting might keep us awake.

CHAIRMAN BABCOCK: Well, do we want -- at some point, we've got to bring this -- we have to have closure. So do you want to let people -- yeah, Nina.

MS. CORTELL: I think we can probably resolve it now. I mean, I can't speak to the family law issue, but I do have a concern I think I'm hearing already expressed with agreed judgments. That's opening a whole can of worms unless we more fully go into it.

The whole presumption on conventional trials, so on and so forth, won't be true here, and you have a lot of partial agreed orders entered. And once -- you know, so I think if we're going to go into that, we'll have to really define it a lot more carefully.

My suggestion would be to stay away from that and just to address the family law issue narrowly, which I guess is handled by divorce decree, but I don't know that.

(Simultaneous discussion)

UNIDENTIFIED SPEAKER: Joan, did you ever see a divorce decree that had some other title on it?

MS. JENKINS: No, I do not. And I think David is absolutely right. And Richard and I had talked about this briefly, and I think that does address our concerns. And I think that definitely is something that needs to be in the rule.

CHAIRMAN BABCOCK: And we talked about agreed judgments, perhaps not fully enough, but we talked about it a lot last time.

HONORABLE DAVID PEEPLES: Well, as I hear Nina, she's saying something is agreed, but it really doesn't deal with the whole case, and you shouldn't -- and you're right about that. That's a valid statement.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: I move to take out "agreed judgments."

MS. JENKINS: Second.

PROFESSOR DORSANEO: Done.

CHAIRMAN BABCOCK: Take out agreed judgments?

HONORABLE DAVID PEEPLES: The word "agreed judgments" and the commas on both sides of it are gone from Line 5. You got that, Richard?

MR. ORSINGER: No, but I'll catch up with you. I stepped out for a moment, and I didn't know the most important issue of the day was going to be taken up.

CHAIRMAN BABCOCK: We almost sent for you.

Okay. With that done now -- Bill.

PROFESSOR DORSANEO: Well, the only other thing I would say -- this may not be necessary, but in Calvert's language in the Oil Bridge case by conventional trials, he talks about, you know, if there's no order of severance or separate trial or no order of separate trial, maybe he just says that, I don't think that needs to be in there myself, but --

HONORABLE DAVID PEEPLES: Bill, to me, that would rebut the presumption.

PROFESSOR DORSANEO: Yeah. All right. Okay. Fine.

CHAIRMAN BABCOCK: Okay. With those changes, are we prepared to approve this rule?

MS. CORTELL: Yes.

CHAIRMAN BABCOCK: Anybody opposed to this rule as amended?

(No verbal response)

CHAIRMAN BABCOCK: So this will pass unanimously and be sent to the court. Hallelujah.

HONORABLE SARAH DUNCAN: And a hand for David Peeples.

CHAIRMAN BABCOCK: And for Sarah Duncan.

(Applause)

MS. CORTELL: I sort of published the prior version of the rule, Portions Before a Divorce

Decree and Agreed Judgment, at a talk I gave on finality, and it was really excellent because it really does capsulize along a pretty simple and straightforward way, and I just thought I'd tell you it was very helpful to the crowd.

CHAIRMAN BABCOCK: Okay. Let's talk about 306a.

HONORABLE SARAH DUNCAN: The subcommittee started from Pam Baron's letter in which she stated, and the committee thinks correctly, that Rule 306a was operating as one big "gotcha" because of several discrete questions that didn't have clear answers in the case law. The Courts of Appeals were all over the place on several critical questions.

We have -- my memory is -- yes. October 19th of 2000, the committee submitted a -- subcommittee submitted a report to the full committee. I believe Deborah disseminated copies again, "Report of the Subcommittee on Texas Rules of Civil Procedure, 300 to 330."

In that report is Rule 104, which is the recodification draft of Rule 306a. We addressed several questions, and I'd like to -- rather than go over the whole rule, which I think could be incredibly confusing, take one question at a time and then look

at how the committee resolved it and how that's reflected in the proposed rule and then debate that and see if there's agreement on disagreement or what the problems are rather than trying to go through the whole rule at once. And I'm sorry the pages aren't numbered.

At the top of one page, it says, Arabic 3, TRCP 306a/Procedure. Issue 1 a -- it says "a" -- states, as I've just said, that there's several discrete issues about which there's a great deal of disagreement. Subpart b is the subcommitee's recommendation. And then we go down to the specific recommendations.

The first issue we dealt with is, "When does a 306a motion have to be filed?" There were some courts who held that a 306a motion had to be filed within 30 days after the date the judgment was signed, without regard to when notice was received. There are other courts who said that it had to be filed within plenary power, but, again, that dated from the date the judgment was signed without regard to notice.

The ultimate effect in a few cases was that people had to file a 306a motion before they even learned that they needed to file a 306a motion. That's the Stokes case cited in the report, which was

reversed on other grounds by the Supreme Court.

The committee decided to recommend to the full committee that there not be a time limit on when a 306.a.4 motion had to be filed, and that's reflected in the following page. Rule 104 -- I'm sorry, two pages away -- Subsection -- Rule 104(e)(5)(b), "A motion seeking to establish the application of Paragraph (e)(4) may be filed at any time."

After the subcommittee rendered its report, the Supreme Court held, in John v. Marshall Health Services, September 2001, that the 306a motion had to be filed at any time within the period that the trial court had plenary jurisdiction over the judgment, measuring from -- measuring that date of plenary power from the new date that's established by a 306a procedure.

It's my understanding, in speaking with Justice Hecht today, that it's acceptable to the court if we just file -- the rule says "at any time." The problem is writing a rule that says, "Here's your deadline, but we don't know when your deadline is until after we've decided your motion." And it's easier just to say "may be filed at any time," and then the court -- the trial court will find the

date -- the substituted date of judgment, and then we can decide whether the motion was timely or whether any motion for new trial was coming.

JUSTICE HECHT: I mean, I think, as a practical matter, it comes out at the same place, because -- just to give an easy example, if you file this motion way later than it would do you any good, even if the motion is good, then it doesn't -- then you just deny the motion. You can't get the benefit of it if you file it long after the matter --

HONORABLE SCOTT BRISTER: Two years.

JUSTICE HECHT: Yeah, two years or six months, some long period after the 90 days, which is the longest period we have, so -- looks, to me, the same.

HONORABLE SARAH DUNCAN: What I'd like to do is discuss them as we go through rather than going through 1, 2, 3, 4, 5, because I think we're all going to get really confused.

CHAIRMAN BABCOCK: Yeah. I can't even find it in my notebook. Let's all go through a page numbering process.

If we start on the first page, "Report of the Subcommittee on Texas Rules of Civil Procedure" and label that 1. Arabic 1, "Final Judgments," will

be Page 2. Lower case (a), "Issue," will be Page 3. Arabic 3, TRCP 306a/Procedure will be 4. "Rule 104.Timetables" will be Page 5. The page that begins with, "That is filed pursuant to but not in compliance with this paragraph may be amended" will be Page 6. Arabic 5, "Motions that Extend Plenary Power" will be Page 7. And I apologize, again, for not having numbered the pages.

MR. ORSINGER: I have a Page 8, Sarah. You don't have a Page 8, "Duration"?

HONORABLE SARAH DUNCAN: There is a Page 8. I just don't have it.

MR. ORSINGER: No. Probably, it's an earlier page that's out of order. The page that says Arabic 1, "Duration" is supposed to be page what? It's my last page.

CHAIRMAN BABCOCK: That's my last page.

HONORABLE SARAH DUNCAN: It's 8. I just don't have it, for some reason.

CHAIRMAN BABCOCK: Okay. Do you want to go through them one by one? How do you want to go through them?

HONORABLE SARAH DUNCAN: Yeah. I'd like to go through them one by one and have discussion and a vote on when the Rule 306a motion should be filed.

CHAIRMAN BABCOCK: What page are we starting on, Sarah?

HONORABLE SARAH DUNCAN: Page 6, Subpart (a).

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: "Time to File Motion."

CHAIRMAN BABCOCK: "A motion seeking to establish the application of Paragraph (e)(4) may be filed at any time"?

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: All right. Any discussion on that?

CHAIRMAN BABCOCK: Has everybody gotten to it?

MR. ORSINGER: That's page -- what?

CHAIRMAN BABCOCK: 6.

HONORABLE SARAH DUNCAN: 6.

CHAIRMAN BABCOCK: Anybody opposed to it?

MR. ORSINGER: Can I be sure I understand it?

In other words, if it's filed much, much, much later -- months later, is the motion going to be denied? You can file it, but it's going to be

denied? So what we're saying now is, "We're not keeping somebody from filing it untimely." We're just saying, "If you file it untimely, you'll lose it."

HONORABLE SARAH DUNCAN: Right.

JUSTICE HECHT: Well, actually, it might be granted, but it won't do you any good.

HONORABLE SARAH DUNCAN: It might be granted, but the date -- the substituted date of judgment will be too late to do any good.

JUSTICE HECHT: If you say -- if judgment is rendered on January the 2nd and you file a motion on February the 1st and -- sorry -- and you didn't get notice of it until February the 1st, but you don't file a motion until September the 1st, then the motion might be granted and say, "Yes. You didn't get notice till February 1st, but it doesn't matter because all of your time has already run."

PROFESSOR DORSANEO: That's pretty tricky.

(Laughter)

PROFESSOR DORSANEO: Actually, I had a case years ago where the time was set out and the Dallas Court of Appeals kind of assumed that if they had time to rule on this motion they had time to let me do something.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I was counsel in the Stokes case, and in that situation, the clerk sent out the wrong date of judgment to the parties. If that were the correct date, the appeal was timely perfected because the motion for new trial was filed on the 30th date after that date. They didn't find out that was the wrong date until the show cause order issued from the Court of Appeals after 90 days had expired from the date of judgment. But I would think they could still go back and file a motion and get the date set and everything would be timely retroactively. So in that situation, it would work.

HONORABLE SARAH DUNCAN: Right, right.

MS. BARON: Okay.

HONORABLE SARAH DUNCAN: Right. The only reason we said "at any time" is just because going through all of that and saying, "Your deadline for filing the motion is within the trial court's plenary power as measured from a date that we're going to set in ruling on your motion," just got a little awkward.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I agree it's very awkward, but I feel like this is misleading. If someone

doesn't go through all of the steps, then they will take it literally and think that, "No harm will befall me if I file three years later." I'm a little concerned it's a minor trap the way -- as written.

CHAIRMAN BABCOCK: Do you agree with that, Sarah? Tricky? Trappy?

(Laughter)

HONORABLE SARAH DUNCAN: I don't see it as a trap, but I'm more than happy -- and I think the whole subcommittee is more than happy to --

CHAIRMAN BABCOCK: Spring the traps, take the tricks out of it?

HONORABLE SARAH DUNCAN: -- say it as awkwardly as it's going to be said. I mean, because it is going to be --

MS. CORTELL: I understand that, but I'm a little concerned that someone who doesn't fully study it and read through all the parts may misread the language.

HONORABLE SARAH DUNCAN: Within the trial court's -- that it would be within the trial court's -- "at any time within the trial court's plenary power as measured from the substituted date of judgment established by -- under the order."

MS. BARON: Well, I don't know that

that's -- is that your concern?

MS. CORTELL: Yeah.

MS. BARON: Oh, okay. All right.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I was just thinking an alternative would be to say "a motion seeking to establish application may be filed at any time, but a timely filed motion may be denied if the time limits have run." Is that a better way to say it or not?

CHAIRMAN BABCOCK: "A timely filed motion may be denied if the time limits have run"?

MR. TIPPS: Well, if the issue is, you can file it -- well, that's -- we need to clean up the language. You're right.

CHAIRMAN BABCOCK: David.

HONORABLE DAVID PEEPLES: I should know this, but why do we need to change the language of the rule if the Supreme Court two months ago fixed the problem?

MR. GILSTRAP: Two weeks ago.

HONORABLE DAVID PEEPLES: Two week ago, was it? Whenever.

CHAIRMAN BABCOCK: Recently.

HONORABLE SARAH DUNCAN: The subcommittee has not discussed this, so I can only

speak for myself, but, for myself, it's not good enough that it's in a Supreme Court case. If there's a deadline for filing it, it ought to be in the rule.

CHAIRMAN BABCOCK: It wouldn't hurt to be in the rules is the point, if it's consistent with the law.

CHAIRMAN BABCOCK: Richard. Then --

MR. ORSINGER: Is this analogous to a rule that says "motion for new trial may be filed at any time, but if it's not filed within 30 days, it's invalid or it's going to be denied"?

I mean, we normally say that you can file something during that period of time when it has some legal effect, if you file it. And beyond that time, we don't lead people to believe they can file it because some of them may infer from that that they have that extra time to file.

JUSTICE HECHT: But it could happen, that's the point. Either -- I think Pam's point is that even if you filed it months and months and months later because you didn't know you needed to file a motion until then, it would still be okay because you went through the procedural steps as it happened in a timely fashion. You just didn't realize you were doing it at the time.

MR. ORSINGER: I see the difference. I sure do.

MS. BARON: But I'm not sure my case would work because you still would have gotten notice of the judgment actual date past the 90th day.

JUSTICE HECHT: If you get notice after the 90th day, then --

MS. BARON: Well, I mean, the first time they found out that the date on the card was wrong was when the Court of Appeals told them it was wrong, because it was actually filed within 90 days but the Court of Appeals didn't issue their show cause order until after the 90th day.

So are those people just out of luck even though they did everything right?

MR. ORSINGER: Bill of review time. That's good grounds for bill of review. You have a meritorious defense.

JUSTICE HECHT: Well, if you were mistaken about the day by, say, ten days or something, the clerk told you one thing and you didn't look it up and so you were mistaken about the day and you went from that -- and you perfected everything, and so everything was -- and if that's the right day you're in, it shouldn't make any difference if you file the

306a motion six months later.

MS. BARON: But I think the 306a motion sets the date as the date of knowledge -- right -- date you got notice of late judgment, Sarah?

HONORABLE SARAH DUNCAN: Are you saying does --

JUSTICE HECHT: Oh, I see what you mean.

HONORABLE SARAH DUNCAN: I have to say our court, as a for instance, has been operating more in the way that Pam is proposing. When we -- regardless of whether there is a 306a motion on file or not, when we look at the clerk's record and see that there's some slippage between the date of judgment and the date a motion for a new trial was filed, we issue an order saying, "Explain this to us. And if you need to file a 306a motion do." And we may not look at the record -- the clerk's record until way after this time has expired.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't understand when the time expires in view of TRAP 4.2(d), which says, "Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to hear the 306a motion." So when --

HONORABLE SARAH DUNCAN: And that's part

of the reason for the show cause order that we issue.

MR. HAMILTON: When does the time expire? We're talking about that you can file it, but it isn't going to do you any good because it's too late.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I thought the conversation we had when 306.a.4 was talked about originally was -- the consensus of the committee was a lawyer ought to be checking the file every three months. And we spent a lot of time trying to figure out how much time should be the outside limit, because we didn't think it was a good idea to leave judgments open forever. And that was my recollection of the conversation.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I'm actually re-remembering my experience, and the "filed at any time" did relate back to a set of circumstances that demonstrated that there was time for filing a motion for new trial because of the date of knowledge or notice.

With the addition of more language, I could like "at any time." You know, what would the more language be, "as long as it is demonstrated

that"?

CHAIRMAN BABCOCK: More.

PROFESSOR DORSANEO: "That knowledge or notice was acquired," you know.

JUSTICE HECHT: Oh, but you wouldn't want filing to turn on that. They file their motion, you say, "Well, when did you first learn about this? Well, way after 90 days. Okay. Well, you can't file your motion."

PROFESSOR DORSANEO: No. I'm saying you --

MS. BARON: Actually, there's no 90-day provision in the rules anymore. Is there, Sarah?

HONORABLE SARAH DUNCAN: Yeah. There's an outside limit.

PROFESSOR CARLSON: I think it's Subsection 4. Subsection 4, maybe.

MS. BARON: Oh, the no change provision?

PROFESSOR CARLSON: The very end, yeah. "But in no event shall such period begins more than 90 days after the original judgment or appeal order was signed."

PROFESSOR DORSANEO: Here's what I think. You have a judgment and somebody files a motion for a new trial or perfects the appeal, you

know, beyond 30 days so it looks late, but then at some point later it could be demonstrated that it wasn't late because no knowledge or notice was acquired, you know, after the date the judgment was signed, and, you know, not longer than the 90 days -- I mean, short of the 90 days. I really think that's the case that I had, and this motion was argued and happened much, much later. I think that may be a common situation where somebody is a little late.

HONORABLE SARAH DUNCAN: I'm now remembering that that's why -- we actually did discuss what the Supreme Court ultimately held within the plenary power as measure from the substantive date, and it was because of cases like Bill's or like those we get all of the time that we just finally said "at any time."

If the Court of Appeals notices the error when it looks at the clerk's record, which in some courts could be a long time after the date of judgment or the substituted date of judgment, shouldn't those people have the opportunity, still, to go back and establish that their motion for new trial was within 30 days of the date that they had notice?

MR. ORSINGER: They sure should.

CHAIRMAN BABCOCK: So, Sarah, you're

okay with this language? You like this language?

HONORABLE SARAH DUNCAN: I like the language without anything else.

CHAIRMAN BABCOCK: Okay. You like it as is.

HONORABLE SARAH DUNCAN: I like it "at any time."

CHAIRMAN BABCOCK: And, Justice Hecht, do you think this is --

JUSTICE HECHT: I think it's good.

CHAIRMAN BABCOCK: Good, yeah.

JUSTICE HECHT: I like it.

CHAIRMAN BABCOCK: All right. With those --

JUSTICE HECHT: I see Nina's problem, but -- I mean, you might look at this and say, "Okay. I'm going to win. Thank God."

(Laughter)

MS. CORTELL: Three years later.

CHAIRMAN BABCOCK: Soon. Relatively soon.

Anybody want to vote on anything on this?

HONORABLE SARAH DUNCAN: I move that we adopt.

CHAIRMAN BABCOCK: Okay. Move that we adopt this language as is. Anybody second that? Rich.

MR. ORSINGER: Yeah, but when you say "this language," you're talking about the whole rule?

HONORABLE SARAH DUNCAN: I was going to say, can we not piecemeal it? Can we just --

CHAIRMAN BABCOCK: I thought you wanted to piecemeal it.

HONORABLE SARAH DUNCAN: I want a piecemeal discussion.

CHAIRMAN BABCOCK: Not a vote?

HONORABLE SARAH DUNCAN: And then hopefully we're all going to agree with all the parts of the rule that were written and we'll vote it up or down.

CHAIRMAN BABCOCK: Fine with me.

PROFESSOR DORSANEO: Let's look at the contents of the motion then.

CHAIRMAN BABCOCK: Okay. Now where do we go?

HONORABLE SARAH DUNCAN: The second issue that the committee addressed on Page 4 is verification. And the subcommittee really tossed this one around and what we ultimately ended up with was a

compromise.

There were several people on the subcommittee, including me, who thought that the seriousness of this whole procedure, of substituting a new judgment date, should mean that you should have to file a verified motion. But at the same time, many members of the committee believed, again, including me, that if it wasn't verified and there was no objection, that shouldn't cause your motion retroactively to be defective so that the court wasn't invested with jurisdiction -- vested with jurisdiction.

So what the committee adopted was the compromise. And if you look at the bottom of Page 5 in (e)(5)(a), "Requisites of Motion," it does have to be -- the rule requires that it be a verified motion, but the last paragraph, "If an unverified motion is filed and the respondent does not object to the lack of the verification at any time before the hearing on the motion commences, the absence of a verification is waived."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I don't have any problem with that, because, as a practical matter, you either grant or deny the motion based on the evidence that's

presented at the hearing and not based on the accusations in the motion. And I think that it's really ridiculous to say that someone who didn't verify a motion but who was able to prove it through sworn testimony to the satisfaction of the trial judge should somehow lose on appeal because the motion wasn't verified when the sworn evidence persuaded the trial judge.

So I think if you have an objection to that, you should raise it before the hearing or else you're going to be -- your papers are going to be graded on the evidence in the hearing.

HONORABLE SARAH DUNCAN: The problem is that there are several Courts of Appeals that have held, "If you don't file a verified motion, the court's 306a jurisdiction is not invoked, even if you later prove the contents of your motion at an evidentiary hearing." And we, in fact, had one of those cases and it's a hard thing to tell somebody that, "Yeah, you proved exactly what you needed to prove, but your invoking instrument was defective."

CHAIRMAN BABCOCK: Way harsh.

HONORABLE SARAH DUNCAN: Way harsh.

(Laughter)

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I don't even think it's a good idea to have a waivable verification requirement. It just seems to me to be just acquiring formalisms that aren't necessary. And whenever I file anything, you know, it's with the court that contains information. I mean, I'm standing behind that information.

JUSTICE HECHT: The chances --

PROFESSOR DORSANEO: Why should I assume that if I didn't verify it that I might be fooling you, especially since we're going to have to have proof of it at a hearing?

HONORABLE SARAH DUNCAN: I don't think it's that anybody assumes one way or the other. I guess several of the committee members, and my perspective on it, is that this is a pretty serious procedural change, to change the date of the judgment. It consumes a great deal of trial court time. And you ought to have to put some -- put your credibility on the line when you file one of these motions.

I mean, we've had motions from attorneys that do everything they can do not to state the date their client got notice of the judgment.

(Laughter)

HONORABLE SARAH DUNCAN: I'm serious. I

have been amazed at the manipulation of the language in 306a to avoid saying what the rule requires you to say, to avoid getting a finding of what the rule requires you to find in the hopes that they're going to kind of slide it through.

PROFESSOR DORSANEO: Do they verify these?

HONORABLE SARAH DUNCAN: No. Frequently not.

PROFESSOR DORSANEO: I thought you were going to say, "Yes," and then the answer would be, they said --

(Simultaneous discussion)

HONORABLE SARAH DUNCAN: Well, as I say, frequently not, but I think that's part of the mixture here. I don't see anything wrong with, if you want a new date of judgment, you've got to file a verified motion. And if I require you to file a verified motion, before I go to the expense -- I mean, let's say someone files an unverified motion and I, as the defendant, with the judgment in my favor object and say, "No. You've got to file a verified motion." Part of my reasoning very well could be, "You can't verify what the rule requires you to verify and you shouldn't be able to put me to the expense of a

hearing until you've filed the verified motion."

Now, if I'm not concerned about that and I'm -- you know, I've got a good lawyer on the other side and I feel quite sure we're going to go to a hearing and they're going to prove their allegations and my objecting to the lack of verification isn't going to make any difference, I can waive it. But why shouldn't the movant be required to swear to the truth of the facts in the motion to put me to the expense of having to litigate that?

CHAIRMAN BABCOCK: Okay. And frankly, Justice Hecht mentioned that, you know, not too many DA's are going to probably prosecute if the verification is not accurate. However, if somebody is playing loose, a district judge might really treat that differently and with more seriousness and roast a lawyer who was playing loose with the facts.

HONORABLE SCOTT BRISTER: Do you have to have an oral hearing on these?

MR. ORSINGER: Yes.

HONORABLE SARAH DUNCAN: We're going to get to that.

HONORABLE SCOTT BRISTER: I mean, in the current rule, I don't see it.

HONORABLE SARAH DUNCAN: We're going to

get to that.

MR. ORSINGER: I think it is in the current rule. I don't have it with me, but I've been through these before.

HONORABLE SCOTT BRISTER: I'm looking at it, and it says, "On sworn motion and notice, the party adversely affected is required to prove in the trial court on sworn motion and notice."

MR. ORSINGER: That doesn't mean hearing to you?

CHAIRMAN BABCOCK: Okay. Any more discussion on the verification?

(Simultaneous discussion)

HONORABLE SCOTT BRISTER: Texas law almost never requires oral hearing unless you absolutely say "oral hearing."

HONORABLE SARAH DUNCAN: We'll get to that in a minute.

CHAIRMAN BABCOCK: Okay. We're going to get to that in a minute.

HONORABLE SCOTT BRISTER: Okay. Because then, obviously, that makes a difference if the judge can decide it without an oral hearing. Then you've got to have a verified motion, same as a continuance.

I mean, generally, the reason we require

verifications -- verified defenses are things that are almost always one way, and if you're going to make everybody go to the time and expense of finding out whether it was like it is in almost all the time, you've got to swear to it first.

CHAIRMAN BABCOCK: Okay. We're going to get to the hearing --

HONORABLE SCOTT BRISTER: So if it's contributory negligence, you don't. But if it's, "That's not my signature. That's a forgery of my signature," you've got to swear to that because that's a time and an effort that we assume in 99.9 percent of the cases ain't so. It seems to me, getting a notice from a trial court is a 99.9 percent rule and you ought to have to swear to it if you -- rather than just making us go to all of this trouble by just saying it ain't so.

CHAIRMAN BABCOCK: Well, Sarah agrees with you, but notwithstanding the fact that she also thinks we ought to have an oral hearing, which we're going to get to.

HONORABLE SARAH DUNCAN: We're going to -- that's a question.

PROFESSOR DORSANEO: Point of information. In this draft, how would this work?

There's an unverified motion or a motion that's not verified properly. I'm assuming that to be a verified motion. It has to be a properly verified motion. Okay? And here's where we go. We're going to have -- the hearing is set and I say, "Your Honor, before we have this hearing, I would like to object to the lack of proper verification." What happens? Go home?

HONORABLE SARAH DUNCAN: Well, at the bottom of Page 5, "If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect."

PROFESSOR DORSANEO: So we've got to stop the presses and go start over?

HONORABLE SCOTT BRISTER: No, no, no. You just say --

HONORABLE SARAH DUNCAN: You just have to find a notary.

HONORABLE SCOTT BRISTER: -- "Here's the court reporter. Do you want to swear to your motion then?" They say, "No. I prefer not to swear to my motion."

(Laughter)

CHAIRMAN BABCOCK: See you.

MR. TIPPS: Came close.

PROFESSOR DORSANEO: So it's really kind of a trial amendment.

HONORABLE SARAH DUNCAN: Is there something that you want that's different?

PROFESSOR DORSANEO: If you're going to have this verification, I would like to have it waivable a little earlier than immediately before the hearing. Because it's at least unsettling if somebody says, "Well, I would like to point out that this paperwork is not in compliance with the rule," and then somebody needs to know, "Well, I need more time to get it fixed up." And some judges might say that we have a court reporter here who can handle this for you; some judges might just scourge you.

HONORABLE SCOTT BRISTER: This is not like scaring up a witness. This is getting something sworn to. The courthouse is crawling with notaries.

CHAIRMAN BABCOCK: That was exactly what I was thinking. You know, you don't have trouble getting a notary at a courthouse.

MR. GILSTRAP: This is, in effect, the same rule we have with temporary injunctions.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: You can waive it and we all have been through that dramatic moment where the

people say, "Well, it's not verified" and the guys come forward and swear to it. Sometimes it really brings the truth out.

PROFESSOR DORSANEO: Well, temporary injunctions, you know -- never mind.

CHAIRMAN BABCOCK: Okay. Anything more on this?

(No verbal response)

CHAIRMAN BABCOCK: Okay. We're past this issue now, Sarah. Not having voted on it, but --

HONORABLE SARAH DUNCAN: Okay. It's okay.

CHAIRMAN BABCOCK: I'm following your lead on this one. So far, brilliant tactics.

(Laughter)

HONORABLE SARAH DUNCAN: Issue No. 3 is amendments to the motion. The committee was unanimously of the view that the movant should be able to amend, at any time, the motion, within the discretion of the court. That's reflected in -- on Page 6 Subpart --

MR. GILSTRAP: That's the same as (a).

HONORABLE SARAH DUNCAN: Yeah. It's supposed to be in (b).

CHAIRMAN BABCOCK: Should that be (b)?

MR. HAMILTON: The last sentence in that same paragraph.

HONORABLE SARAH DUNCAN: Yes. Thank you. The last sentence on page -- beginning on Page 5 and ending on Page 6, as Carl points out, "In all other respects, a motion that is filed pursuant to but not in compliance with this paragraph may be amended with the permission of the court at any time before an order determining the motion is signed." We've actually had cases -- well, we've got different versions of this, it appears.

CHAIRMAN BABCOCK: Yeah. Some of it is at the top of Page 6, in some of these drafts.

HONORABLE SARAH DUNCAN: We've actually had cases where someone filed a motion that didn't comply with the rule. It wasn't verified. It didn't contain the assertions of fact that it needed to contain. And a big question was raised, "If a good motion, a motion that complies with the rule is necessary to invoke the trial court's 306a jurisdiction, will a motion that's not in compliance with the rule invoke the trial court's jurisdiction?" And the subcommittee was of the view that, if it's defective, you ought to be able to amend it. And it's the filing of the motion itself that restarts the

court's jurisdiction.

CHAIRMAN BABCOCK: Okay. Does anybody have any problems with this?

Pam.

MS. BARON: It's brilliant.

CHAIRMAN BABCOCK: It is?

MR. ORSINGER: "Brilliant," she said. That's --

(Simultaneous discussion)

PROFESSOR DORSANEO: You used Justice Hecht's Dawson --

HONORABLE SARAH DUNCAN: Yeah --

PROFESSOR DORSANEO: -- language --

HONORABLE SARAH DUNCAN: -- by memo and input, basically, wrote this rule. And this subcommittee is deeply grateful for their input.

CHAIRMAN BABCOCK: What's your adjective for it, Bill?

MR. ORSINGER: Remarkable.

CHAIRMAN BABCOCK: What was your adjective about the last stuff? Marvelous, wasn't it?

PROFESSOR DORSANEO: Remarkable.

CHAIRMAN BABCOCK: Remarkable.

(Laughter)

CHAIRMAN BABCOCK: Okay. What's next?

HONORABLE SARAH DUNCAN: Issue No. 4, "Date." This may sound a little squirrelly, but the subcommittee was of the unanimous view that the movant should have to establish the dates required by the rule. And believe it or not, there are cases out there that basically say -- they can establish some other date or we've had instances in our court where the trial court just doesn't want to find the date and so we keep sending it back and forth from the Court of Appeals down to the trial court and keep saying, "Find the dates that are in the rule." So we thought the rule should say that --

CHAIRMAN BABCOCK: That the order should say that?

HONORABLE SARAH DUNCAN: Well, no. We think both. If you look on my Page 5, some people's Page --

CHAIRMAN BABCOCK: Yeah. It's Page 5.

HONORABLE SARAH DUNCAN: Is it everybody's Page 5?

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: (a), Requisites of Motion, Subsection 3, "the date upon which either the party or its attorney first received the notice required by Paragraph (e)(3) of this rule; or acquired

actual knowledge that the judgment or appealable order has been signed." That has to be stated in the motion.

And on the next page, (d), the "Order," the trial court's order has to establish those dates.

CHAIRMAN BABCOCK: Got you. Any discussions about those items?

HONORABLE SCOTT BRISTER: Don't you mean "the earlier" or "the earliest date upon which," because it just doesn't -- we're at his trial and he's saying, "Well, my attorney didn't find out about this until X date." It doesn't say when the party first found out about it.

HONORABLE SARAH DUNCAN: I'm sorry?

HONORABLE SCOTT BRISTER: Shouldn't it be "the earliest date upon which either the party or its attorney first"?

MR. ORSINGER: What if the party found out --

HONORABLE SARAH DUNCAN: Are you talking about "(a), Requisites of the Motion"?

HONORABLE SCOTT BRISTER: (a)(3).

MR. ORSINGER: The lawyer typically will find out before the client. So what I'm going to do, if I'm an unethical lawyer, is, I'm going to just push

the date the client found out about it to try to finesse when I found out about it.

HONORABLE SCOTT BRISTER: This is the date the party first heard about it.

MR. ORSINGER: You give them the choice of either disclosing the date that the lawyer learned or the date that the client learned.

HONORABLE SARAH DUNCAN: I'm sorry. That's not how I read -- are you talking about Subsection (3)?

CHAIRMAN BABCOCK: Yes, (a)(3).

MR. ORSINGER: They're all the same.

HONORABLE SARAH DUNCAN: "The date upon which either the party or its attorney" --

CHAIRMAN BABCOCK: "First."

HONORABLE SARAH DUNCAN: -- "first" --

HONORABLE SCOTT BRISTER: Yeah, but if I swear the date I -- my party first learned about it -- yeah, it's just a drafting suggestion. You put "the earliest date."

HONORABLE SARAH DUNCAN: The earliest date.

CHAIRMAN BABCOCK: The earliest date upon which either --

HONORABLE SARAH DUNCAN: There's only

one date that either one or the other first acquired notice or knowledge.

HONORABLE SCOTT BRISTER: Yeah, I know. But an unscrupulous attorney will pick the latter of the two.

MR. ORSINGER: I think each one of them has the date they first learned. And under some interpretations, you're allowing them to choose which one to disclose.

HONORABLE SARAH DUNCAN: That's not the intent. The way I think it's written --

HONORABLE SCOTT BRISTER: I think we all agree on what the intent is. It's just -- I don't think this says that. I think it can be clarified by saying "the earliest date," but --

CHAIRMAN BABCOCK: Why don't you say, "the earliest date upon which either the party or its attorney received the notice." Strike "first."

HONORABLE TOM LAWRENCE: Isn't that the same problem?

CHAIRMAN BABCOCK: It's the same problem if you say the earliest?

HONORABLE SARAH DUNCAN: Okay. Can we get to drafting a little later and just do concept right now?

(Laughter)

(Simultaneous discussion)

HONORABLE SARAH DUNCAN: I do want to cure it, but I want to cure --

MR. ORSINGER: It sure is different when it's your own words being discussed.

(Laughter)

HONORABLE SARAH DUNCAN: I want to get through the concept and then cure the language.

CHAIRMAN BABCOCK: The strategic decision to press on.

(Laughter)

HONORABLE SARAH DUNCAN: Okay. The fifth issue --

CHAIRMAN BABCOCK: This is a masterpiece in progress.

(Laughter)

HONORABLE SARAH DUNCAN: Well, the masterpiece is going to fall apart right now because -- okay. Never mind.

The fifth issue is a deadline for a ruling. The committee, again, was unanimously of the view that no matter how much the trial court doesn't want to find these dates, we really kind of need to go on with the program. So if you look at Page 6,

Subpart (c) the trial court is given a ten-day window -- I'm sorry. The movant is given a ten-day window in which to request a hearing. The court is directed to hear the motion as soon as practicable. And we actually didn't establish a deadline for the court to rule on the motion.

(Laughter)

CHAIRMAN BABCOCK: However, important issue that may be.

HONORABLE SARAH DUNCAN: However important that may be.

(Laughter)

MR. GILSTRAP: Unfinished masterpiece.

CHAIRMAN BABCOCK: Yeah. Right. A couple of strokes missing from this --

(Laughter)

HONORABLE SARAH DUNCAN: Let's go on to 6.

HONORABLE SCOTT BRISTER: But that's a drafting problem.

(Laughter)

CHAIRMAN BABCOCK: So far, I like this rule a lot.

HONORABLE SARAH DUNCAN: I'm sorry. No, it actually does -- no, it doesn't. Okay. We have to

fix that. Okay. But does everybody agree that there should be a deadline by which the court should rule?

(No verbal response)

CHAIRMAN BABCOCK: I don't hear any dissent from that.

JUSTICE HECHT: Should it be later than at the conclusion of the hearing? I mean, is this something the judge needs to think about for a couple of weeks?

HONORABLE SCOTT BRISTER: No.

MR. ORSINGER: Yeah, but they're writing it to when they have to sign the written order. So when do you know -- ever know that a lawyer has brought a written order to a state court proceeding?

CHAIRMAN BABCOCK: What's the consequences if he doesn't do it, too?

HONORABLE SARAH DUNCAN: Issue No. 6 on Page 4.

(Laughter)

MR. ORSINGER: Okay. Sarah, just so you'll know, the numbering on your page, everything I've got is a (1) and an (a). So when you say (b), (c), (6), it means nothing.

HONORABLE SARAH DUNCAN: Okay.

MR. ORSINGER: I have a whole column

full of (a)'s here.

HONORABLE SARAH DUNCAN: I'm sitting here looking at exactly what you're looking at and I don't know how you're following it at all.

(Simultaneous discussion)

(Laughter)

PROFESSOR CARLSON: That's part of the strategy.

HONORABLE SARAH DUNCAN: But fortunately, I think yours does have boldface type. If you look at the paragraph that begins "Procedure in the Appellate Court" on Page 4.

CHAIRMAN BABCOCK: Page what?

HONORABLE SARAH DUNCAN: Well, it's my Page 4.

The subcommittee thought about and talked a long, long time about adding a paragraph on what the procedures should be in the Court of Appeals. And we ultimately came to the conclusion that there are too many possibilities on when someone might file a 306a motion when the court looks at the reporter's record and issues an order or a letter.

In the Fourth Court of Appeals, we seem to do everything by an order to show cause. We don't send out letters. We don't call people on the

telephone. We simply show cause them. In some courts, they like nice friendly letters from the staff attorneys or the clerks and, "Please do this" and "Please do that." In other courts, they actually -- telephone people and say, "We've got a problem with this and you-all need to fix it."

We decided we couldn't dictate what the procedure needed to be in the Courts of Appeals. They probably all had their own procedures and it wasn't so important to the process that we tell them what that procedure be as it is to get these dates. We did, however, feel that an amendment was required to TRAP 4.5 to clarify that the trial court has continuing jurisdiction to entertain 306a proceedings. We've actually had trial courts that wrote us back and said, "You told me to hold this hearing, but I can't hold this hearing because my plenary power has expired." And this would just be a clarification.

So if you look at Page 6, TRAP 4.2 (d), "Continuing Trial Court Jurisdiction. Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to hear and determine motions filed pursuant to Texas Rule of Civil Procedure 306.a.5."

CHAIRMAN BABCOCK: Any comments about

that?

Bill.

(No verbal response)

CHAIRMAN BABCOCK: Stunned him.

(Laughter)

HONORABLE SARAH DUNCAN: We are on such a roll.

MR. HAMILTON: I have a comment about it.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, it doesn't have if it's filed outside of 90 days. So that's misleading.

PROFESSOR CARLSON: But does it have the power to deny it? Doesn't it have the power to deny it?

HONORABLE SARAH DUNCAN: The way we've constructed the rule -- and you may disagree with it, but the way we've constructed the rule is that if you file a 306a motion, the trial court's jurisdiction is restarted to the extent of ruling on that motion. And the trial court can grant it, deny it and make this order that finds these dates.

CHAIRMAN BABCOCK: Joan. Just thought I'd call on you.

MS. JENKINS: I appreciate that very

much. I have nothing to add.

(Laughter)

MR. ORSINGER: How about subtract?

(Laughter)

MS. JENKINS: Well, I could do that.

HONORABLE SARAH DUNCAN: Those were the substantive issues that the subcommittee looked at. What the subcommittee also, I think, unanimously believed is that the current 306.a.4, as much as some members of the subcommittee thought it was absolutely clear, it's apparently not clear to a whole lot of lawyers, and so we tried to rewrite the rule in a way to make it clear. And that's why I was so concerned about Judge Brister's comment, that it's not clear as to what date we're talking about.

A lot of attorneys have said, in oral argument, for example, in a mandamus, they didn't understand that it was the date their client got the notice, if that preceded the date either they got a notice or acquired actual knowledge. So what -- we did rewrite the rule to try to clarify the terms of the rule.

So now what I'd like do, since we seem to agree on the concepts, is look at the language of the rule and see if the concept is incorporated in the

provision of the rule in a way that everybody thinks is clear.

HONORABLE SCOTT BRISTER: And you're going to discuss hearing later?

(Laughter)

HONORABLE SARAH DUNCAN: Oh, I'm sorry.

MR. ORSINGER: Yeah. I have some comments on hearing also.

HONORABLE SARAH DUNCAN: I'm sorry. We'll do it now. It was not actually anything that has emerged in the case law as being an unsettled issue, but it was -- it did emerge from the committee as being an issue about which there was disagreement -- some disagreement.

I think the case law is fairly uniform now that, whether the rule currently requires it or not, people are holding hearings, oral hearings, evidentiary hearings to prove the things that are required by 306.a.4. There were at least two members of the subcommittee, and perhaps more, who felt that if the assertions of fact in the motion aren't controverted, there's no point in having an oral hearing. And that's, I think, something the committee can -- that's an easy question for the committee to decide, to either be like a 120a motion or we can

require an oral hearing that we can --

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I dislike the requirement that the responding party has to have their sworn evidence attached to a response. These issues will implicate sometimes the testimony of district clerks or assistant district clerks and sometimes staff in the office of the opposing lawyer. And you may be able to get an affidavit from an assistant district clerk or you may not be able to, but I'll guarantee you, you can't get an affidavit from the opposing lawyer's staff.

And so in order to even have a shot at getting somebody under oath in front of the judge to answer a direct question, if I can't ever get that opportunity without getting an affidavit from that witness, you've made it impossible for me to refute an allegation using witnesses under the control of the opposition.

So I feel like a hearing should be required, that there should be subpoena power. I noticed that you mentioned the discovery process here, which I like, although I'm wondering what discovery is available after the plenary power has been lost and we're having a hearing, you know, within ten days and

I don't know whether we're sending in interrogatories or whether we're just issuing subpoenas, so I'm interested to hear what the discovery will be.

But my point is, the defending party needs to be able to subpoena people and put them under oath and ask them a direct question, in my opinion.

HONORABLE SARAH DUNCAN: We've actually had -- I can't think of the specific case, but we have had a case in which there was extensive discovery on the notice of knowledge question.

MR. ORSINGER: I guess by depositions?

HONORABLE SARAH DUNCAN: Depositions. Hastily convened depositions.

MR. ORSINGER: Well, I mean, I guess all of our discovery rules are pretrial, except we have one rule that permits post-judgment discovery to enforce the judgment. We don't specifically authorize post-plenary power discovery on 306a, but this, inferentially, gives you some kind of discovery.

I'm not against it. I think some kind of discovery is okay, but we're inferring that you can take a deposition, because nobody says you can, as I understand the rules. Do you agree?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Anybody else?

Yeah. Judge Brister.

HONORABLE SCOTT BRISTER: Yeah. I'm for doing it by discovery. I'm always hesitant to do satellite litigation just because, you know, court time is a premium, and I'm trying to imagine what's going to happen under withering cross-examination that the person who swore they didn't get it is going to break down and admit that they lied, "Oh, yes. I did get it." Maybe. I just never saw it in my 11 years on the bench.

You know, the problem is, if somebody gets on the stand and says, "I didn't get it" or says it in a motion, the law is clear, the fact that you sent it, there's a presumption you got it, but that presumption is overcome when the recipient says, "I didn't get it." And what are you going to controvert that with?

But if you give people the right to subpoena and have a nice big courtroom, a nice big trial on this issue, my concern is, this will be used by the wrong people for the wrong purposes. I just don't -- my general feeling is, most of these, you probably have to decide them based on whether the applicant has got a good case or unless they're going

to break down and admit they're lying; you're not going to have a mole inside their office who's going to prove that they really did get it. And how much power do you want to give to warring parties to subpoena each other's secretaries and paralegals and officemates to find out what their mailroom procedures are?

I just -- true, in most cases, it's not going to be a problem, but the cases it's going to be a problem in, it's going to be a big problem, you know. I just hesitate getting into a right to have it orally. And I don't have any problem if the judge wants to do it by order. If the judge wants to spend their time doing this, that's fine, but I sure would prefer to leave it as the rule the thing you're -- the thing you're entitled to do is discovery and a hearing, but the law in Texas is clear, hearing can be oral or in writing, depending on what the judge says.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: It seems the closest analogy that I can draw to this would be like a Craddock motion, and I don't notice that -- and I think the law pretty clearly there is that you need to have -- maybe you don't need to have a verified motion or one supported by affidavits, but if you do have

affidavit support or a verified motion setting forth facts and those are not controverted, that they're presumed to be accurate.

I have some question as to what you need to do to controvert or what's sufficient to controvert somebody's affidavits in support of a Craddock motion. I think it's unclear as to whether you can file a notice of controversion or whether you need to controvert in some other manner, like by engaging in discovery or securing an affidavit from some other source or something like that.

The problem, though, doesn't seem to come up, you know, all that much, and, you know, my comment on the mechanics of this is that it seems to require a lot. You know, you have a verified motion and then you're going to have -- you can use affidavits and the affidavits have to be -- you know, the affidavits have to be served at least seven days before the hearing. That kind of invites somebody taking a deposition or engaging in discovery and I think almost engineering this to the point where you're inviting a whole big panoply of activities when that might not happen if you didn't go into all this detail about it.

HONORABLE SARAH DUNCAN: Well, it's

happening, as I understand it, now. The (c) was patterned after a 120a hearing and --

HONORABLE SCOTT BRISTER: (c), I wouldn't pattern it after a continuance. You've got to have a verified motion for a continuance, but you don't get a -- and I think you ought to, you know, get an oral hearing where the judge says, you know, "What do you say about that," something like that. I don't have any problem with that, but you wouldn't do discovery on a continuance and you wouldn't --

HONORABLE SARAH DUNCAN: Well, maybe it's just my perception, and if the committee disagrees with me, but I think substituting a new date of judgment is a hell of a lot more important than whether you're going to continue a trial for a case.

HONORABLE SCOTT BRISTER: That's because you're an appellate lawyer.

(Simultaneous discussion)

HONORABLE SCOTT BRISTER: You know, the most important thing is a continuance for a trial.

(Laughter)

CHAIRMAN BABCOCK: Particularly if you've got prepaid tickets to DisneyWorld.

(Laughter)

HONORABLE SARAH DUNCAN: In most of

these cases, whether the date -- whether you get a new substituted date of judgment is going to determine -- I mean, the reason it's important is because the motion for new trial or the notice of appeal was late by one day or two days or four days, whatever that gap is in the notice or knowledge. So from the appellee's perspective, this could be the most critical part of the appeal, is deciding if there is a substituted date of judgment. So, to me, to compare it to a continuance is not the --

HONORABLE SCOTT BRISTER: Yeah, but we bend over backwards to say your appeal is timely. We've got a rule that says we should do so. So aren't we going to at this hearing bend over backwards to try -- I mean, shouldn't we be bending over backwards to try to say your appeal is timely and we're going to decide it on the merits. I mean, that's what the TRAP rules are all about.

HONORABLE SARAH DUNCAN: We have a policy in favor of getting to the merits if we can, but nobody can accuse me of -- after Verburgt, of not wanting to get to the merits, but it all keys off of the date of judgment. And if -- that, at least, I think has to be something that either is as a matter of fact or is very carefully considered if it's going

to be a substituted date.

It's not the same as saying, "If somebody files a motion for extension of time to file a notice of appeal within the 15-day window, we're going to assume -- or files a new notice of appeal -- a notice of appeal, we're going to imply a motion." This is much more serious than that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I like the proposal because it is tracking the special appearance procedure, and, you know, we've got several of these type proceedings. I think the Supreme Court recently said, "This is how you also determine a plea of jurisdiction," and -- Bland against Blue Independent School District.

And there's several other instances, and it seems to me now, we've got this particular type of hearing. It happens in several instances. Everybody knows what the rules are and it seems to make more sense to do it that way than to create some type of special hearing with its own rules and own burdens for this particular instance.

HONORABLE SCOTT BRISTER: What part of this -- I read Bland to say, "You've got to do whatever kind of hearing you need under the

circumstances." It seems, to me, the circumstances of this is whether somebody is going to swear -- is whether two people swear when they first got the motion. And I'd just be surprised if we need a whole bunch of cross-examination and discovery for that.

MR. GILSTRAP: What you do is, you know, you have -- you can do it by affidavits and if they're disputed affidavits, then you have to have a hearing and the judge has to decide based on the credibility of the witnesses. I mean, I see this as the same type of procedure.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: To address Scott's concern, I don't have a problem -- if you have the opportunity to do discovery and you do it and you're satisfied that the affidavits are truthful, then, you know, you don't put up a contest and you don't have a hearing. But I would not like a situation where the defending party has to take, on faith, the affidavit of the lawyer who probably screwed up.

And there will be lawyers who know that they're going to get sued for malpractice if they don't get this case into the appealable status. And if they know that there's no depositions or no hearing in which anyone is going to inquire, some lawyer is

going to say, "I first learned of this on such and such a date," when he knows full well that someone in the mailroom opened that envelope on another date. And unless there's some, at least, plausible fear that someone will catch you if you're doing that, I really think it's just going to be --

HONORABLE SCOTT BRISTER: How in the world is the guy in the mailroom -- maybe that's changed now. Maybe people are tracking their mail more carefully, but how in the world is anybody except the attorney going to know when we got this notice. People in the mailroom are not going to recall. The secretaries are not --

MR. ORSINGER: Well, maybe I should have said legal assistant.

HONORABLE SCOTT BRISTER: The secretary is not going to know.

MR. ORSINGER: In my office, my legal assistant knows more than I do.

(Laughter)

HONORABLE SCOTT BRISTER: Well, then it's going to be you or your legal assistant swearing to the thing.

MR. ORSINGER: No, no. It would be me swearing. I mean, I wouldn't do this, but if I was of

this kind, I would say, "I first learned about it, you know, on Monday" and I would ignore the fact that my legal assistant learned about it the previous Friday.

CHAIRMAN BABCOCK: You just think that way; you're not one.

(Laughter)

MR. ORSINGER: Let me tell you something, you want your divorce lawyer to be paranoid.

(Laughter)

CHAIRMAN BABCOCK: That's a good point.

Bill.

PROFESSOR DORSANEO: Well, the 120a model, I'd say, you know, is a serviceable model, but, really, there are problems with 120a. But aside from that, let's just work through this.

You said, "The court shall determine the motion on the basis of pleadings." What pleadings are you talking about? You're talking about the motion?

HONORABLE SARAH DUNCAN: Motion and response.

PROFESSOR DORSANEO: Response?

HONORABLE SARAH DUNCAN: If there's a response.

PROFESSOR DORSANEO: All right. Now,

what if there's no response?

HONORABLE SARAH DUNCAN: Well, then there's only one set of facts that's before the court.

PROFESSOR DORSANEO: And the verified pleadings, that takes care of it? Game over?

MR. ORSINGER: No. I don't agree with that. I think there should be a hearing unless Scott's right and the judge doesn't have to have a hearing.

PROFESSOR DORSANEO: See, in the 120a context, it says "pleadings," but the special appearance is really a responsive pleading to a petition. So it's kind of a different context. All right?

Now, if I'm reading this, I would say, "Well, this probably means I need to file a response," even though that's not maybe so clear elsewhere, "because I need to controvert the verified assertions in the motion." Okay?

I mean, I don't know for sure whether the pleadings are evidence, the equivalent of affidavits or not. If they are, then how does it work? Is it like venue then? If I deny the allegations in the verified motion or in the motion then they need to get -- then their next shot is to

get an affidavit and they need to give me that seven days before so I can controvert that in some manner, probably by taking discovery?

I think by just moving language from one place -- frankly, in the 120a context, I mean, it's not so clear as to what you do with these affidavits certainly seven days before the hearing. Okay? And I guess the suggestion is, if you want to do something about them, you'd better get on with it, take some sort of, you know, discovery or do something to permit you to cope with that affidavit or perhaps to assert that the affidavits that you need can't -- you know, you can't get them or something. 120a is not so mechanically clear either, you know, I don't believe.

If it's the idea that we need -- if affidavits will do; we don't need live testimony. Okay? Then we need -- and if the idea is that you don't want to accept their affidavit without cross-examination, you ought be entitled to get an affidavit and decide, you know, whether you're going to take it as true or controvert it. If you're going to controvert it, we could just say, "File a notice of controversion and then they have to put on live testimony" or we can say, "To controvert it, you need to take a deposition." What's better?

HONORABLE SCOTT BRISTER: Bill, why is it more like a continuance hearing. I mean, special appearance has to be complicated because everything you've ever done with relation to the state gets into it. But why is it like a continuance? The question is, "Can I be there or not?" Simple question, "Did I get it or not?"

Why is it the paradigm? Certainly under the current rule, a paradigm is more like a motion for continuance. "I swear to it. And if something sounds fishy, we'll look into it," but, I mean, special appearances are a mess, I agree.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I just think the stakes are much higher. I think Bill's original Craddock motion is much closer. You're losing your case, and that's just different from having a trial date set.

HONORABLE SCOTT BRISTER: No, no. You're trying to save your case.

MS. CORTELL: Well, either which way. It depends on which side of it you're on.

HONORABLE SCOTT BRISTER: Yeah. And the person who's wanting to do all of the discovery is wanting to knock somebody out on a procedural point.

(Laughter)

HONORABLE SARAH DUNCAN: Wait a minute. Wait a minute. This isn't just a procedural point.

HONORABLE SCOTT BRISTER: What is it?

CHAIRMAN BABCOCK: It's a missed deadline.

Our court reporter is bone weary or finger weary, so let's take a little break. Ten minutes. Then we'll come back to this brilliant campaign to approve 306a.

(Recess)

CHAIRMAN BABCOCK: Okay. Well, we've got more agenda items depending on how much longer this is going to take. Fulton v. Finch, is that a long-time deal? Do we have to talk about that for a long time?

MR. WATSON: I'd say an hour I think.

PROFESSOR DORSANEO: It's hard to draft it, but I think the policy point is probably pretty easy to talk through.

CHAIRMAN BABCOCK: Okay. And then we've got the service of process -- where did Orsinger go? Can't get very far on this issue with Sarah leaving, can we?

PROFESSOR CARLSON: She just said moot the question, I think.

(Laughter)

PROFESSOR DORSANEO: Seriously, the Fulton v. Finch thing could be talked about, and it involves partially the history of 329b.

CHAIRMAN BABCOCK: Yeah. We're going to try to talk about it.

MR. WATSON: Today?

CHAIRMAN BABCOCK: We're going to try, if we get through this other thing.

MR. GILSTRAP: There's an incentive.

(Laughter)

CHAIRMAN BABCOCK: Okay. So where are we, Sarah?

HONORABLE SARAH DUNCAN: I think we were on the hearing.

CHAIRMAN BABCOCK: Okay. There's a split here, obviously, between Judge Brister's view and your view. I mean, I don't want to personalize it, but --

(Laughter)

CHAIRMAN BABCOCK: That seems to be where that -- the two people that most eloquently articulated the opposite considerations.

HONORABLE SARAH DUNCAN: I don't know that I even articulated. I think Orsinger actually

did a much better job than I did.

CHAIRMAN BABCOCK: Okay. So who believes that the rule should take into account Judge Brister's ideas, that it just ought to be less complicated, less formal? How did you put it, Judge?

HONORABLE SCOTT BRISTER: Just less stuff.

CHAIRMAN BABCOCK: Right. So how many people adhere to the Brister view of this rule? Raise your hand.

(Laughter)

CHAIRMAN BABCOCK: That would be Brister.

MR. TIPPS: It's clear to the Brister position.

(Laughter)

HONORABLE DAVID PEEPLES: Never let someone else state your position either.

(Laughter)

CHAIRMAN BABCOCK: And how many adhere to the Duncan/Orsinger view?

(Simultaneous discussion)

HONORABLE DAVID PEEPLES: Chip, we need to know what those are a little bit more than that. Are we talking about a right to an oral hearing or

discovery or what?

CHAIRMAN BABCOCK: Judge, it was my understanding, it was mostly the whether or not it was going to be done pretty much just on the sworn motion and affidavits as opposed to the option, not the requirement, but the option to have an oral hearing and more formal discovery.

HONORABLE DAVID PEEPLES: I'd like to support what I heard Richard Orsinger say, which is, the person responding to this ought to have the right to get those people in court and examine them under oath with the judge there. And I just don't think it's going to be that many hearings, but, you know, affidavits ought not to prove it without some scrutiny.

CHAIRMAN BABCOCK: Yeah. So I think the Peeples/Duncan/Orsinger articulation of this view has carried the day.

HONORABLE SARAH DUNCAN: I would add, a further consideration, I think, is that we're talking about changing the date of judgment, conceivably, after the time for appealing and filing a motion for a new trial has expired and after that attorney has theoretically been let go.

CHAIRMAN BABCOCK: Got you.

Bill.

PROFESSOR DORSANEO: I would just suggest that maybe the Surgitek model, Civil Practice Remedies Code 15.003, would be better than the 120a model, because it does talk about pleadings controverting and then the use of live testimony if live testimony is necessary, et cetera. It seems to be a latter day generation of the same thought process.

I think affidavits ought to be useful -- ought to be, you know, available for use, but I don't think, as Richard said, that you should be stuck with somebody else's affidavit without being able to controvert.

HONORABLE SARAH DUNCAN: You think you should or you shouldn't?

PROFESSOR DORSANEO: Shouldn't.

CHAIRMAN BABCOCK: Should not.

HONORABLE SARAH DUNCAN: You should be able to get them into court and cross-examine them?

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Yeah. Just about everybody thinks that.

Okay. Where do we go now?

HONORABLE SARAH DUNCAN: Where I'd like to go is to start at the beginning of 104. And if somebody has a problem with the discrete subsection, either because of the rewrite for clarification or because of the implementation of one of the concepts we've discussed -- I mean, the most obvious example is that the committee agreed there ought to be a time limit for the judge to sign an order emanating from the hearing, and that particular subsection doesn't contain a time limit, but it could be something that is less obvious than that with a -- I think it was Judge Brister who brought out on (a)(3) on Page 5 that he doesn't interpret that to mean what we have stated our intention to be. So if we could just go through subsection by subsection.

CHAIRMAN BABCOCK: Okay. Let's do it. Are you on 104(e)(3)? Is that the first change?

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN BABCOCK: Does anybody have any comments on that?

HONORABLE SARAH DUNCAN: Nina did have one comment, and that is that we delete the "e" in judgment in the second line and the subcommittee unanimously wants to adopt that proposed amendment.

MR. HAMILTON: Delete what?

HONORABLE SARAH DUNCAN: The "e" in judgment. I was lapsing back to my British heritage.

CHAIRMAN BABCOCK: It's not going to be "judgement."

MR. HAMILTON: So it's going to read "the earliest date upon which" --

MS. JENKINS: No. "Judgement." She's just changing the spelling.

CHAIRMAN BABCOCK: It's a typo. It's just a typo.

MR. HAMILTON: I know that, but, I mean, we're talking about the change in (a)(3).

MR. TIPPS: No. We're talking about (e)(3).

CHAIRMAN BABCOCK: "E" as in elephant.

Okay. Rule 104(e), as in elephant, (3), any comments about the changes there?

(No verbal response)

CHAIRMAN BABCOCK: Everybody okay with that?

(No verbal response)

CHAIRMAN BABCOCK: All right. Unanimously, that will be approved.

All right. (5)(a) was the next change. Correct?

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: That would be, actually, (e)(5)(a). Right?

HONORABLE SARAH DUNCAN: Should be.

CHAIRMAN BABCOCK: Okay. (e)(5)(a), any problems with that?

HONORABLE SARAH DUNCAN: I would point out on this, one of the points of clarification from the old rule was that the committee understood the intent of the old rule to be that it's not notice of the judgment in a constructive notice sense, but it is the clerk's notice that acts as the trigger.

CHAIRMAN BABCOCK: Okay. Nothing in (e)(5)(a), the preamble. How about (e)(5)(a)(1), any problems with that?

(No verbal response)

CHAIRMAN BABCOCK: (e)(5)(a)(2), recognizing that some of our drafts have misnumbering, but (e)(5)(a)(2) would be "That neither the party nor its attorney received the notice," any problems with that?

(No verbal response)

CHAIRMAN BABCOCK: If I'm going too fast, let me know. (e)(5)(a)(3), this is what Judge Brister raised, and I think he raises a good

point here.

Stephen.

MR. TIPPS: I've got an alternative suggestion to address the same problem. Upon rereading this, it's -- I think it's very clear from (e)(a)(2) that when it says "neither the party nor its attorney," that whichever one receives it first, that's the relevant date. I think the ambiguity is created in (e)(5)(a)(3) by the inclusion of the word "either." And I think we can solve the problem just by taking out "either." At least that's a way to do it.

CHAIRMAN BABCOCK: What do you think, Sarah?

MR. ORSINGER: I like that.

CHAIRMAN BABCOCK: I think that's a good fix.

Judge Brister, does that seem good to you?

HONORABLE SARAH DUNCAN: Correct me if I'm wrong, Stephen, but I thought the reason we put "either" in is because some people -- some attorneys had not understood that it was the date that "either" the attorney "or" the client received the notice.

MR. TIPPS: But my point is that that

is -- that point is made by Paragraph (2), where it says "neither." And having said "neither," you don't need to say "either."

PROFESSOR CARLSON: Why not just put "the date upon which the party and its attorney first"?

HONORABLE SARAH DUNCAN: Because it's not "and."

MR. ORSINGER: Yeah. It better be "or."

HONORABLE SARAH DUNCAN: We're looking for a hypothetical. Attorney withdraws and clerk sends the notice of judgment to the client. Some time after that notice is received by the client, the attorney acquires actual knowledge of the judgement. It's the first date -- right -- that we're concerned with. And I'm -- we're all happy to change the language, but that's the common misconception amongst attorneys, is that that date that the client received the notice is still going to be the trigger date.

CHAIRMAN BABCOCK: Judge Brister, if we strike the word "either," does that get it done?

HONORABLE SCOTT BRISTER: I don't think so.

CHAIRMAN BABCOCK: No. Okay.

HONORABLE SCOTT BRISTER: Better, just

take the first off the end and put in as the second word.

CHAIRMAN BABCOCK: So "The first date upon which either the party of its attorney received"? Sarah, would that be acceptable?

(No response)

CHAIRMAN BABCOCK: It would read, "The first date upon which either the party or its attorney received the notice required," et cetera, et cetera.

MR. ORSINGER: Wouldn't earliest be better?

HONORABLE SCOTT BRISTER: Either one.

MR. ORSINGER: "Earliest" is better than "first."

CHAIRMAN BABCOCK: Judge Brister, "earliest"?

HONORABLE SCOTT BRISTER: That's fine.

PROFESSOR DORSANEO: Say, "The earliest date upon which the party or its attorney first."

HONORABLE SCOTT BRISTER: Why do you need both?

HONORABLE SARAH DUNCAN: Because you've got an option of two things in (a) and (b). And what we want to know is which -- as between (a) and b, which happened first? And as between attorney and

party --

HONORABLE SCOTT BRISTER: "The earliest date" is going to be in here, though.

MR. ORSINGER: Scott, you have to remember, we're writing this rule for people who can't understand it.

(Laughter)

HONORABLE SARAH DUNCAN: Well, I'd like to second what you said, we're writing the rule for people who don't understand the rule as it's currently written, which, in my view, is perfectly clear.

CHAIRMAN BABCOCK: Okay. "The earliest date upon which either the party or its attorney first received the notice required."

MR. TIPPS: That's saying it a lot of different ways.

MR. ORSINGER: What if we put "absolutely" in front of first?

(Laughter)

HONORABLE SCOTT BRISTER: As long as Brian Garner is going to take it out later, that's fine with me.

CHAIRMAN BABCOCK: All right. So we got that fixed. What's next (e)(5) -- the numbering is confusing.

HONORABLE SARAH DUNCAN: There is no number -- are you talking about "If an unverified motion is filed"?

CHAIRMAN BABCOCK: Yes.

HONORABLE SARAH DUNCAN: There's no --

CHAIRMAN BABCOCK: Is that part of (e)(5)(3)?

HONORABLE SARAH DUNCAN: It's the second paragraph of (a).

MR. HAMILTON: Just a matter of housekeeping, that last sentence that we referred to about the amendment probably ought to be under the next Paragraph (b) because it says "Time to File Motion, Amendments."

CHAIRMAN BABCOCK: Yeah. I'm having --

HONORABLE SARAH DUNCAN: Can I suggest the opposite, that we put amendments under "Requisites of Motion"?

CHAIRMAN BABCOCK: Hang on for a second, though. We're on (e)(5)(a), and so far we have a (1), (2) and a (3). Correct?

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: All right. Now, this paragraph that shows up here, "If an unverified motion is filed," what is that under?

HONORABLE SARAH DUNCAN: It's not under any of them. (a) has a colon --

CHAIRMAN BABCOCK: Yes.

HONORABLE SARAH DUNCAN: -- as to what the requisites of the motion should be.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: The paragraph that begins, "If an unverified motion is filed" relates to what happens if the motion doesn't contain those. I'll find another rule that goes with that. It's a common rule writing technique.

CHAIRMAN BABCOCK: So we have an (e)(5)(a), but no (e)(5)(b)?

HONORABLE SARAH DUNCAN: No. (b) is on the next page.

CHAIRMAN BABCOCK: That's "Time to File Motion"?

HONORABLE SARAH DUNCAN: Uh-huh.

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

HONORABLE SARAH DUNCAN: But I think Carl is right, that we need to put amendments -- we need to make it "Requisites of Motion, Amendments."

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: And then take "Amendments" out of "Time to File Motion."

CHAIRMAN BABCOCK: Okay. All right.

HONORABLE JAN PATTERSON: One small grammatical on Paragraph (2), Sarah, that third line, instead of "nor acquired actual knowledge." I think that should be "or acquired actual knowledge."

MR. TIPPS: (e)(5)(a)(2).

CHAIRMAN BABCOCK: (e)(5)(a)(2).

HONORABLE SARAH DUNCAN: "Or."

CHAIRMAN BABCOCK: "Or," okay.

All right. The hanging Chad of a paragraph that says "If an unverified motion is filed and the respondent does not object" --

HONORABLE SARAH DUNCAN: I think "hanging Chad" was a brilliant use of that term.

CHAIRMAN BABCOCK: Any problem with that paragraph?

(No verbal response)

CHAIRMAN BABCOCK: Bill, any problem with that paragraph?

PROFESSOR DORSANEO: I was doing something else.

(Laughter).

MR. ORSINGER: We were talking about Rule 229b, but we'll talk about that later.

CHAIRMAN BABCOCK: Okay. Nobody has got

any problem with that. So now we are on to (e)(5)(b), which is "Time to File Motion," strike the word "Amendments." Any problem with (e)(5)(b)?

(No verbal response)

CHAIRMAN BABCOCK: This strategy is working very well?

(Laughter).

CHAIRMAN BABCOCK: All right. No problem has got any problem with that. (e)(5)(c), "Hearing," any problems with that?

HONORABLE SARAH DUNCAN: Oh, come on. I feel very deceptive.

Bill.

MR. TIPPS: I like Dorsaneo's Civil Practice and Remedies code language better than that we have.

CHAIRMAN BABCOCK: You liked what?

MR. TIPPS: I liked Bill's suggestion that we use the language from the Civil Practice Remedies Code rather than 120a.

HONORABLE SCOTT BRISTER: Where was that, Bill?

PROFESSOR DORSANEO: Well, it's really in the court's opinion --

MR. TIPPS: Venue, isn't it?

PROFESSOR DORSANEO: -- in the Surgitek case saying how a 15.003 hearing should be conducted.

MR. GILSTRAP: What's a 15.003 hearing again?

PROFESSOR DORSANEO: If the plaintiff can independently establish venue, how you establish that you're entitled to be in this county with the other plaintiffs because of essential need, among other things.

HONORABLE SARAH DUNCAN: And is that acceptable to Mr. Orsinger?

CHAIRMAN BABCOCK: You know, without seeing the language in front of me, I'm not going to take a position, but if I had to go blind, I'll go allow with Bill.

PROFESSOR DORSANEO: All I'm saying is just look at that. I think it's a more advanced version.

HONORABLE SARAH DUNCAN: How about if we rewrite (c) and we'll give the committee two versions of (c) at the next meeting.

MR. ORSINGER: The only thing is, I don't know -- Bill didn't say anything about discovery; I do like the idea of some mention of discovery. And there's no mention of discovery on the

venue hearing. Right?

(No verbal response)

MR. ORSINGER: Well, look at it. But anyway, I think the concept of mentioning discovery is important.

CHAIRMAN BABCOCK: Okay. So this is -- (e)(5)(c) will get talked about at the next meeting. All right. How about (e)(5) --

MR. TIPPS: Chairman?

CHAIRMAN BABCOCK: Yes.

MR. TIPPS: Question on that. Are we going to include some language concerning the time within which the court has to conduct a hearing?

CHAIRMAN BABCOCK: Yeah. What about that, Sarah?

MR. TIPPS: You had already mentioned that that was missing.

HONORABLE SARAH DUNCAN: No. I think what's missing is the time within which the rule --

CHAIRMAN BABCOCK: Got a rule, that's right.

HONORABLE SARAH DUNCAN: The current (c) says, "The court must hear the motion as soon as practicable."

HONORABLE SCOTT BRISTER: And that's the

same as we did on recusal. Right?

HONORABLE SARAH DUNCAN: We couldn't come up with anything better because we started talking about, like, judges in South Texas that wander.

MR. ORSINGER: What they want, they want a ruling.

MR. TIPPS: What about your deadline for a ruling?

HONORABLE SARAH DUNCAN: Right. That I think should be (d).

CHAIRMAN BABCOCK: In (e)(5)(d).

MR. TIPPS: Oh, that goes in another place. Okay, fine.

CHAIRMAN BABCOCK: Okay. So we're done with (e)(5)(c). Now we're onto (e)(5)(d) and we've already identified that there should be a provision in there to deal with how quickly the judge should rule. And you're going to work on that. Right?

HONORABLE SARAH DUNCAN: Well, do people have suggestions?

CHAIRMAN BABCOCK: Do people have suggestions now?

HONORABLE SARAH DUNCAN: I think there has to be a long enough period of time for the movant

to get an order to the court or we could just assume that the movant is going to bring an order to the court and they can make whatever modifications are required at the hearing. So maybe the trial judges should suggest when they think an appropriate time to rule would be.

MR. HAMILTON: Ten days. No more than ten days.

HONORABLE DAVID PEEPLES: That sounds like a long time.

CHAIRMAN BABCOCK: What does?

HONORABLE SARAH DUNCAN: Ten days.

HONORABLE SCOTT BRISTER: How about that day? I mean, if that was me, I could put this on the Xerox machine, and then at end of 1 put "no" or "yes." And then on the end of 2 put "July the 21st." There you go.

(Laughter)

HONORABLE DAVID PEEPLES: Here's the thing about number of days, it's not enforceable. What are you going to do? So why not just make it "promptly" and be done with it.

HONORABLE SARAH DUNCAN: Okay. "Must" -- do you mind if I split my infinitive -- my verb and say "must promptly sign"?

CHAIRMAN BABCOCK: Fine.

CHAIRMAN BABCOCK: Okay. Any other comments about (e)(5)(d)?

(No verbal response)

HONORABLE SARAH DUNCAN: We're getting close.

CHAIRMAN BABCOCK: Okay. TRAP 4.2(d).

MR. ORSINGER: Before you do that, we've got to have parallelism now between "the earliest date upon which." We edited the motion allegations, that "the earliest date upon which the party or its attorney first received" and here I am saying --

HONORABLE SCOTT BRISTER: Right.

HONORABLE SARAH DUNCAN: Done.

CHAIRMAN BABCOCK: Okay. TRAP Rule 4.2(d).

MR. ORSINGER: I don't like the use of the word "continuing" there because, in fact, it isn't continuing. It's kind of intermittent. I think we ought to strike the word "continuing" and just say "the court has jurisdiction to hear and determine."

CHAIRMAN BABCOCK: Sarah?

HONORABLE SARAH DUNCAN: That's fine.

CHAIRMAN BABCOCK: Okay. No problem.

HONORABLE DAVID PEEPLES: Can we strike

the word "even" at the beginning of that sentence? Do we need that? Does that belong in the rule?

CHAIRMAN BABCOCK: The word is -- "even" is gone? Going, going --

HONORABLE SARAH DUNCAN: Gone.

CHAIRMAN BABCOCK: -- gone. Okay. So now it will read, "After the trial court's plenary power expires, the trial court has jurisdiction to hear and determine motions filed pursuant to...306.a.5."

MR. ORSINGER: Well, let me say this about the "even." Is it possible someone might file one of these before the court has lost plenary power?

HONORABLE SARAH DUNCAN: Absolutely.

MR. ORSINGER: Then the "even" serves the function of saying, "We all know you can do it through the period of plenary power, but you can even do it after plenary power expires."

Right now if you just say "After" --

HONORABLE SARAH DUNCAN: Yeah. It doesn't highlight that you can't do it within the plenary power.

CHAIRMAN BABCOCK: Coming, coming back, "even"? "Even" back in?

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: Judge Peeples? Okay.

HONORABLE DAVID PEEPLES: Sure.

MR. ORSINGER: It does sound a little impreganistic, you know.

(Laughter)

CHAIRMAN BABCOCK: That aside --

HONORABLE SARAH DUNCAN: Well, I think our strategy --

CHAIRMAN BABCOCK: I'll tell you what, who would have thunk it?

Okay. So that's it. Right? So you're going to come back --

HONORABLE SARAH DUNCAN: What we'll do is bring a clean copy of the amended rule and two versions of Paragraph (c) on the "Hearing".

CHAIRMAN BABCOCK: And you're going to add the language on (d) as well -- (e)(5)(d), the parallelism and the --

HONORABLE SARAH DUNCAN: Oh, yeah. We'll bring a clean copy of the rule with this.

CHAIRMAN BABCOCK: Okay. Nicely done, Sarah, although I wouldn't have given odds when we started.

HONORABLE SARAH DUNCAN: You didn't have faith in me.

CHAIRMAN BABCOCK: I've got great faith in you. Let's see if you can get through Fulton v. Finch in the next --

HONORABLE SARAH DUNCAN: I can't, and I will punt to Skip.

CHAIRMAN BABCOCK: Punt to Skip?

HONORABLE SARAH DUNCAN: Yeah. He's done the most constructive work on this, I think.

CHAIRMAN BABCOCK: All right. Skip.

MR. WATSON: I think Dorsaneo wanted to be in on this, but --

CHAIRMAN BABCOCK: Well, Dorsaneo is an adult who could have stayed if he wanted to.

MR. WATSON: Got you.

MR. ORSINGER: Not considering his personal circumstance.

(Laughter)

CHAIRMAN BABCOCK: Which we won't go into on the record.

MR. WATSON: Does everybody have the original e-mail from Justice Hecht setting up the problem with Fulton v. Finch in an order? You need that. You may or may not need my memo. You also probably need 329b open, if you've got access to it. The problem with this is the setup. And just bear

with me as we get through the setup so you can understand the problem.

First of all, the memo addresses the question as posed by the Supreme Court through Justice Hecht, and that is whether the rule of Porter v. Vick should be changed by amendment to the rule. And the reason would be because Ferguson v. Globe Times and other cases have subsequently held that a motion for new trial may not be ungranted and a perfectly good judgment reinstated beyond the 75-day period of plenary power set forth in Rule 329b. Why? Because Rule 329b does not expressly provide a right to ungrant a motion for new trial. Instead, it extends -- 329b(e) extends plenary power for 30 days if a motion for new trial is overruled. And, obviously, it hasn't been overruled if it's been granted.

So you may grant the motion for new -- it says that you may grant the motion for new trial or modify a judgment if the motion for new trial is overruled. The only way I know to go through this is to go through quickly the procession of Supreme Court cases that got us here and show you how we got off the track.

First, in '61, in Fulton v. Finch, the

court at that time was dealing with the version of 329b that says "All motions for new trial must be determined within 45 days after the motion was filed," and the court went on to then hold -- this is not the rule -- "a motion cannot be undetermined outside of the 45 days without destroying the rule." That's the court's language.

Well, then the rule was amended. And no longer does it say that a motion for new trial must be finally determined within a specific period. It just says if it's not decided within 75 days, it's overruled.

So along came Porter v. Vick in '94, and it is a particularly egregious case to set up this problem. In Porter v. Vick, we had a trial to the court. The court is the one making the decisions. There is a motion for new trial filed -- judge enters judgment. Okay? Motion for new trial filed. Judge who tried the case and entered judgment on his own findings can't hear the motion for new trial; so it's assigned to a visiting judge.

The lawyer opposing the motion for new trial can't be at the hearing because he's tied up in trial across the hall. He calls the judge who tried the case and said, "I'm tied up. I can't be there."

That judge's office does not relay that word to the visiting judge deciding the motion for new trial who promptly grants the new trial. That then gets back to the judge who originally tried the case and said, "This is the judgment I want entered." He gets back, in effect, a default granting of a new trial of his judgment.

He says, "No. I'm going to ungrant the granting of the new trial and re-enter my judgment that I intended to enter." What came up was a per curiam mandamus saying that, under the rule of Fulton v. Finch, that order ungranting the granting of the motion for new trial was void. Why? Because the ungranting occurred after the 75 days of plenary power, even though there was no longer any language in 329b saying, "You've got to act, if you act at all, within 45 days." And the court, in Porter, went to the holding of Fulton without talking about the reasoning and said -- here, let me find it here.

In Fulton, the court held "any order vacating an order granting a new trial which was signed outside the court's period of plenary power over the original judgment is void." That's the holding of the case in Porter. Well, then along came a series of cases, the most recent of which was

Ferguson v. Globe Times, and they -- the specific problem in Ferguson v. Globe Times was, there was a judgment entered, a timely motion for new trial. The motion for new trial was granted within the 75 days. They came back, looked at it again, under a motion to reconsider and the judge says, "You know, you're right. I've got a perfectly good verdict. I should not have set aside that judgment. There's no reason to retry this. I was wrong when I set aside the judgment by granting a new trial. So I'm going to ungrant the motion for new trial."

Well, that order ungranting the motion for new trial occurred, not during the 75 days but within the 30 days after the 75 days provided by 329b(e) as is presently codified. And the question was -- a very narrow issue, "Did he have the power to ungrant in the 35 plenary plenary -- I mean, in the 30-day plenary plenary power after the 75 days?" The answer was "No."

The specific holding of Ferguson was, "The trial court may only vacate an order granting a new trial during the period when he continues to have plenary power," period, citing Porter v. Vick and Fulton v. Finch. In other words, carrying that old holding forward saying that you can't do anything to

ungrant a motion for new trial outside plenary power and plenary power only continues for 75 days after the date the motion is signed.

Now, the court said -- well, let me just -- the easiest way is, I can just set it up for you. There is the appellee's argument in Ferguson. Appellee's argument that the rule does not specifically state that the trial court may ungrant a motion for new trial during the 30-day extension period provided by 329b(e) because it's unnecessary to do so. They reasoned that once the trial court initially grants a new trial motion, which is an interlocutory order, the trial court invests itself with full authority over the case until a final judgment is eventually entered. In other words -- and this is why Dorsaneo wanted in on this -- the concept is not what plenary power used to be, both conceptually and in time, but what is it today.

Plenary power today is a period of time in which you must undo a judgment or it's going to be forever final. You can monkey with the judgment you've entered or it's going to be final. It has nothing to do with what happens when that judgment goes away because you granted a motion for new trial; therefore, the plenary power and reason it exists goes

away. Obviously, the court has full power to try the case to do discovery, to grant a motion for summary judgment, and one would think, re-enter judgment on an existing verdict after plenary power and the reason it exists went away when the judgment ceased to exist. But the Amarillo court says, "There is some logic to this argument; however, we believe that the better reasoning is to interpret Rule 329b(e) according to its plain meaning, the rule is clear and unambiguous in stating the types of powers to which it applies. The court should not construe them to mean something other than their plain words unless the application of the literal language would produce an absurd result."

Now, my memo asked: Is it not an absurd result to say that because a trial judge figures out that a judgment should be entered on a verdict and that he or she made a mistake in setting aside the original judgment on that verdict, that he should go through an entire new trial when there's a perfectly good verdict there to enter judgment on just because 75 days expired? That clearly is not what 329b(e) says.

The only question, frankly, that was in my mind was: It was fully briefed -- I mean, the court in Ferguson asked for briefs. I wrote and got

the briefs before the Supreme Court. And everything I'm saying was briefed. I mean, it was out there. And it, obviously, could have been corrected by a PC opinion even, just saying, "Porter v. Vick was a mistake," or whatever, you know, "at that time."

And, to me, the rule is reasonably clear, in that this is -- the reasoning of Ferguson is not a correct reasoning, but it's got Porter backing it up saying, "You can't do anything toward ungranting a motion for new trial after 75 days."

So I've got, you know, a short proposal in my memo of how to redraft it; to say that Dorsaneo had a better proposal, I thought, of just adding a sentence saying, you know, "In effect, this does not in any way affect the power to ungrant a motion for a new trial or to re-enter a judgment."

The question and what you're going to come down to is this -- and it's a policy question, assuming if people agree with what I've just said. If you do, the policy question is going to be: Okay. The court has complete power after a judgment has been set aside by -- to grant a motion for new trial to do whatever it wants, anything it could have done before then. But at what point do we say, "Okay. We've invested too much in this new trial," to say, "Oops,

King's X. I don't like the way this trial is going. Enter judgment on the old verdict"?

And so in the memo I just punted on that and said arbitrarily -- I put in brackets, you know, "It can re-enter judgment, modify, whatever it wants to do, the old judgment, if any time up to" -- and again, arbitrarily I pick, "the beginning of the new trial or, slash, the end of evidence in the new trial." And I don't know how to pick a time when you finally do say, "Okay. Judge, the time to pull the string and go back" -- you know, "bring the yo-yo back and do what should have been done a year ago has gone long enough," but I know -- well, Pam is gone.

I had a long discussion with Pam at the last meeting about this and she believes that -- at least her initial reaction was that there should be a period much less than up to when trial starts to pull that string. I think it's a policy question and it really is a matter of efficiency, "How much hemorrhaging of new attorneys' fees do you want to go on before you say, 'Okay, too much has been invested in the new trial to say you can re-enter judgment in the old'?"

I'm sure I've made that as clear as mud, but that's the best I can do with it.

CHAIRMAN BABCOCK: No. That's very clear. What do the Feds do? Does anybody know?

JUSTICE HECHT: They can undo it. And I don't know if there are limits or not, but I know --

MR. GILSTRAP: I don't think there are. The case that the Amarillo court cited that Galmore v. Missouri Pacific (phonetic), that's one where they went and granted the motion for new trial. They had a completely new trial and then re-instated and then rendered judgment on the old verdict. And the Fifth Circuit bemoaned the fact that there had been such waste of judicial resources, but they let them do it anyway.

And I think that's kind of the abuse that originally -- there was obviously some reason in the original rules why they wanted to limit the trial court's power. The problem is, under the current rules, you can't. It's a trap. But that's a different issue from what the underlying policy reason is for limiting the trial court's power.

CHAIRMAN BABCOCK: Sarah?

HONORABLE SARAH DUNCAN: My only additions to what Skip said, I mean, if you look at the memo from Justice Hecht, I don't understand Fulton v. Finch. I don't see that the fact that the trial

court -- I mean, all 329b Section 3 said at the time was "all motions and amended motions for new trial must be determined within a period of time not exceeding 45 days after the original amended motion is filed." Well, we have the same rule now; it's just 75 days.

And I don't understand where Fulton v. Finch came from except from a desire that there be a period of time beyond which the trial court can't vacate an order granting a new trial.

CHAIRMAN BABCOCK: Frank knows where the Fulton v. Finch baby was born.

MR. GILSTRAP: The thing that we're leaving out and that was talked about Fulton v. Finch is the last sentence of Rule 5, which says, "The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules." And that rule is still with us and the court relied on that in deciding Fulton against Finch.

HONORABLE SARAH DUNCAN: Well, my question remains. I don't see how either one of those --

JUSTICE HECHT: Well, the old rules said "must be determined.," so that's granted, denied, whatever. And once -- that arguably, once that period

passes, then you can't do anything about the motion. You can't go back and re-rule on it. And the rule doesn't say that anymore. It just says "If you don't do something by the 75th day, it's going to be -- if you don't grant it, it's going to be denied."

HONORABLE SARAH DUNCAN: Even in the rule as it existed at the time of Fulton, if the trial court granted a motion for a new trial within the 45-day period, it would be determined within the 45-day period. I don't see how that --

JUSTICE HECHT: But Fulton did not preclude you from ungranting it the next day. If on the 35th day you thought, "I'm going to grant this motion," and you sign the order and the next day you woke up, "I've made a terrible mistake," you could ungrant.

HONORABLE SARAH DUNCAN: Right. But what Fulton does say is that if you grant it on the 35th day, you can't wake up on the 46th day.

JUSTICE HECHT: Right.

HONORABLE SARAH DUNCAN: And what I'm saying is, I don't understand how the rule, at the time of Fulton, required that holding any more or less than it does --

MR. WATSON: I agree with Sarah. I

don't see how Fulton got -- well, I see how it got there, but, to me, there is a qualitative difference between "ungranting motion for new trial" and going in and saying "No. I have the power to enter judgment and I'm entering judgment. You can call it re-entering judgment. I don't have to refer to a new trial as granted. All I can do is just go in and say, 'Here's the judgment that's being signed in this case without reference to a new trial.'".

CHAIRMAN BABCOCK: Joan.

MS. JENKINS: Well, I assume, regardless of how we got to Fulton, we still have a problem that needs to be rectified and I agree that the issue that Skip raised, I think it's critical, especially in family law cases, that the plug be pulled a lot sooner than the commencement of trial. Because when you're granting a new trial in family law cases, which is fully two-thirds of, I guess, the cases that we're looking at, you're talking about a situation where you've got ongoing changing facts on a daily basis and you've got tremendous cost involved in determining what's happening to the estate, reconstructing the estate, not to mention if you've got a series of issues involving children. And so, you're talking about tremendous new discovery cost and problems

associated with this. So I think the plug ought to be pulled as soon as possible.

I agree, conceptually, with the concept that you ought to be able to ungrant, so to speak, but I think the ungranting should be done as quickly as possible. I think there have got to be some time limitations on that.

CHAIRMAN BABCOCK: Scott.

HONORABLE SCOTT BRISTER: I agree, you need to be able to ungrant sometimes, but the way I've seen it usually done is, grant a new trial and then you vacate the order granting the new trial. That creates a problem with what you can complain of.

Sure, you can complain of the order vacating the new trial grant, but that's an abusive discretion. And the problem is, if you've vacated that order, are you too late to go back and say, "insufficient evidence," that kind of thing?

So I think you have to make it crystal clear that you can't just, you know, cut off a lot of appellate rights because you vacated to grant a new trial, and, therefore -- and your time to appeal was way back yonder except as to the order vacating the new trial.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: Yeah, no. You don't want to do that. I can't defend Fulton v. Finch because I wasn't there. And I can't even defend Porter v. Vick, even though I was there.

I agree with Skip that neither case really talks about these policy issues, although I know that the court has not been oblivious to those policies; it just doesn't know what to do about them. And the reason why -- I don't know why -- I'm not sure I know why the court denied the petition in Ferguson, but even if I did, I couldn't tell you.

(Laughter)

CHAIRMAN BABCOCK: Without killing us.

(Laughter)

JUSTICE HECHT: One might well reason that having been mistaken at least twice, there's no point in screwing up a third time. I mean, this really does have some fairly serious policy implications, because on the one hand, it is important to do it sooner rather than later. But on the other hand, if the judge is sitting there at the beginning of a three-week trial and he's just had a pretrial conference and he granted a motion for new trial because he thought an injustice had been done, he thought the sides had not been fully presented to the

court, which happens, and so they've gone back and done a lot more work and now they come in and they basically tell you the same thing that you heard the last time, it really is kind of throwing good money after bad to spend both the State's time and the parties' time in a three- or four-week trial when the judge is already convinced that what happened the first time was the right result and even -- and that's probably what's going to happen this time, and if it doesn't, he's going to be even more troubled about that. I mean, it's hard to know.

Also, not necessarily in connection with any of these cases that are mentioned, but I have heard concerns expressed from time to time that a judge might use this for ulterior reasons, I hate to say, but I suppose it's possible, that either ungrant the motion, and then if the things didn't go like he thought they ought to go, he might hold this as some sort of threat over the parties' heads. Again, I late to even think that that's possible, but -- or rather, Richard suggested something like that.

(Laughter)

CHAIRMAN BABCOCK: Even though he doesn't know anybody who would do that.

(Laughter)

JUSTICE HECHT: So that's why it doesn't seem, to me, to be an easy answer to that and that's why the court finally decided this group ought to come up with a solution instead of us.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: The second half of what I was saying is, I don't think the result -- the first part is, I don't think the result in Fulton or Porter or Ferguson is required by the rule that we've got now. All of the rule that we've got talks about now is, within what period of time do you have to act on the motion or it will be acted upon by operation of law.

The second part of that is, I think, there are very good policy reasons for putting a limit upon the time in which the court can vacate its order granting a new trial. And there may be compelling considerations -- I can't think of any of them -- for extending that period past the period of plenary power, but it would seem to me that the thing -- that what we need to do to the rule is say, "A trial judge may not vacate an order granting a new trial after the expiration of a period -- the period of its plenary power as measured from the original date of judgment," or "120 days" or whatever you want to say.

But the problem, to me, in the rule right now is not that it's silent. Its silence should mean that if there's an order granting a new trial and that order -- that order renders the entire concept of plenary power irrelevant. We no longer have a countdown. Everything is plenary.

So if we want to say that there is another rule of plenaryness over orders granting a new trial, then we need to say that in the rule. If there's a flaw in the rule, it's that it doesn't speak to this now, affirmatively.

MR. GILSTRAP: You just want to codify the results of these cases and spell it out. Right?

HONORABLE SARAH DUNCAN: I don't necessarily want to codify these cases --

MR. GILSTRAP: The results.

CHAIRMAN BABCOCK: No.

HONORABLE SARAH DUNCAN: No. I'm not trying to advocate a particular period of time, although the period of plenary power makes some sense. All I'm saying is that the cure -- is that the rule needs to state whatever period of time it is within which the trial court can vacate an order granting a new trial.

MR. GILSTRAP: I agree. The chief

vice in these cases is that you don't know about the rule unless you read the cases. There's nothing in the rule that really gives you a clue that that's going to be the result.

CHAIRMAN BABCOCK: Well, the other evil of the cases is that right now, as the case from Amarillo shows, that the court -- even though the court has plenary power to do whatever he wants, that's one thing he can't do.

JUSTICE DUNCAN: Right.

MR. GILSTRAP: Yeah. But that's not a problem. There's a reason for doing that. There are many times when -- you know, there are deadlines that the court has got to meet, like "My plenary power runs our tomorrow and I've got to rule on the motion for new trial," and they go ahead and meet it. And if we just tell them what the deadline is, they'll meet it.

CHAIRMAN BABCOCK: Okay. I'm with you. So you like Skip's rule or his proposed change and it's just a matter now of filling in the brackets?

JUSTICE HECHT: If you either deny the motion or let it be denied, the operation, you only have 30 days to change your mind. Here, if you grant the motion, you can't change your mind.

CHAIRMAN BABCOCK: Right. And that's

the problem.

Judge Peeples.

HONORABLE DAVID PEEPLES: I think, probably statistically, most new trials are granted when there's been a default judgment. And I would hope that if there is a default judgment, the judge sets it aside and then the defendant is before the court -- I mean, would we let the judge go back and reinstate a default judgment in effect?

HONORABLE SCOTT BRISTER: We're really talking about trials, because summary judgment, of course, this is not a problem. You grant a summary judgment. Then you change your mind and you want to go back, you just grant it again.

JUSTICE HECHT: See, I mean, this is another example, just procedural on David's hypothetical. Suppose the parties come in after a big default judgment has been entered and says, "Judge, if you'll just grant this motion we'll settle." So the judge says, "Fine. I'll grant the motion."

So 20 days pass, nothing happens -- 30 -- 40, pick a number, they don't settle. And the other side -- the plaintiff goes in and says, "Well, Judge, they said they'd settle. They won't settle. Reinstatement the judgment." The judge says, "Okay."

I mean, is that good or bad?

HONORABLE SCOTT BRISTER: You could do that as long as it's within the plenary power.

HONORABLE SARAH DUNCAN: I think that's the problem, is that the concept of plenary power doesn't make any sense once an order granting new trial has been signed. So let's just pick a number of days. I mean --

MR. GILSTRAP: Set another artificial limit.

HONORABLE SARAH DUNCAN: Shall we just say that, you know, 30 days, 45 days after the judge grants a new trial is the extent of its power to ungrant it.

CHAIRMAN BABCOCK: Ungrant it, right.

HONORABLE SARAH DUNCAN: But it's not a plenary power concept and I think that's part of what's so confusing.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Carl had his hand up before me.

CHAIRMAN BABCOCK: I'm sorry. Carl.

MR. HAMILTON: I agree with some of what you're saying. I don't think the rules support the case law, but -- and Bill and I talked about this

language. Once the court grants a new trial, the court brings the case back, in effect; it ought to have jurisdiction to do whatever he wants to in that case for all purposes unlimited in time.

The language that we came up with is, "If the court grants a new trial by signed written order before the expiration of the period of its plenary power, provided by this rule, the court retains jurisdiction of the case for all purposes." It makes no sense to -- say, if I filed the lawsuit today and it doesn't get to trial for ten years and the court somehow loses power over it and yet if the court grants a new trial, then we're going to somehow limit the court's power to ungrant that motion if the court wants to.

Now, you know -- and we do have abuses of that.

MR. GILSTRAP: Carl, how do you deal with the abuse? How do you deal with the abuse when the judge says, "Okay. Now we're going to have a second trial and I want to see how that goes. We're going to get a verdict. I may sign a judgment based on it or I may go back and sign a judgment based on the first trial"?

MR. HAMILTON: You can deal with that by

saying if he ungrants the new trial -- I mean, if he grants the new trial, that's what he's got to do, is give you a new trial unless he ungrants it. If he ungrants it, then, presumably, he's going to enter the judgment on the verdict.

MR. ORSINGER: What if he doesn't do that until after he sees the second verdict?

CHAIRMAN BABCOCK: Yeah. He gets to pick one of two inconsistent verdicts.

MR. HAMILTON: I mean, I guess we can fix that by saying, "If he grants a new trial, he's got to go with the second verdict," but you do have abuses of the granting of the new trial, at least in our county. We have some judges that routinely grant new trials in the interest of justice if the outcome is not like they want it to be. And then, you know, conceivably that judge may be off the bench a year later or two years later and another judge comes on the bench and then it's presented to him with a record to read of the trial and he says, "This is ridiculous. I'm not granting a new trial. I want to ungrant it." Right now, you can't do that.

CHAIRMAN BABCOCK: It struck me that Skip's rule, and particularly the parenthetical, makes some sense that "at any time prior to the commencement

of evidence in the new trial," because once evidence commences, there is a new trial and you are in the process of creating a new record and you should discourage both judges and litigants from creating a second record and then having to pick or being able to pick between one and the other. So I like that.

Now, Joan's point is a good one, that there are a lot of cases that, you know, so much is happening that it's a problem if you let it go that far, to the commencement -- there is a certain --

HONORABLE SCOTT BRISTER: And you may have never requested the court reporter to type up the transcript of the first trial and she's destroyed her notes.

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: That's a problem.

HONORABLE SARAH DUNCAN: I think it's symbolic of a whole lot of problems that are generated by letting the decision to grant a new trial be without cost.

MR. WATSON: Without consequences, you mean?

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: To me, if the

court is serious about granting a new trial for a legitimate reason, then 30 days is long enough to figure out if they made a mistake. And I'm not saying 30 as opposed to 45, but, for many cases, to get to the point of the commencement of evidence-taking involves enormous costs.

CHAIRMAN BABCOCK: What I'm saying is, that probably -- it ought to be no later than that and probably should be sooner. And so now we're just trying to talk about what the window ought to be.

30 days -- I mean, let's suppose it's going to be done by motion. In a lot of counties, it's very hard to get a motion, you know, up, briefed, responded to and heard in 30 days. So I don't know what the right time is, but it sounds like we are of one mind that there ought to be a rule and now all we're arguing about is how long the judge should have to decide it. Is that fair to say at this late hour?

Richard, bathed in the sunlight that you are.

MR. ORSINGER: I am totally behind the idea of making sense out the second -- I disagree with all earlier cases. I have my own theory on how they got to where they are.

CHAIRMAN BABCOCK: Spare us for the

moment.

(Laughter)

MR. ORSINGER: And so, you know, to me, it's just a question of "How long do you wait?"

I sympathize with Justice Hecht's point, that even if it's late in the case, if the judge says, "Oh, my gosh. I really don't want to pick another jury and try this again," you know, but we're going to condemn them to do that if they don't make the decision soon enough. And then we have an even worse situation, perhaps, which is that we have to wait another six months and then pick a jury trial that nobody really needs to go through and then he's stuck with the result that he doesn't believe in anyway, so --

MR. GILSTRAP: You've just got to pick a date.

CHAIRMAN BABCOCK: Yeah. We've got to pick a date. I have a question, too, and then we'll get around to everybody. What happens -- the federal system, apparently, is unrestrained as to time. And so, are there abuses in the federal system? Is it --

JUSTICE HECHT: I think that's the worst case I know about.

MR. WATSON: That's right. They picked

out the one case where -- you know, where there was a double trial and they picked.

JUSTICE HECHT: Generally, they're not granted, new trials, anymore than -- if anything, state judges grant them more than the federal judges, and they just don't grant them.

And the idea that they would wait very long to ungrant it, I think it's fairly unusual. And that case is kind of a remarkable case.

MR. ORSINGER: Also, the very long period of time leads to the possibility that the bench would change and a trial judge is going to overturn another trial judge's setting aside -- I mean, if this can go on for several years, I can foresee the bench will change.

CHAIRMAN BABCOCK: Yeah. Good point. Nina.

MS. CORTELL: I'm of the view that we should give it a time line of something between 30 to 90 days. I don't think it should go beyond 90. There's too much opportunity for abuse, cost and waste.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I don't care about the time limit. My concern in the series of cases, and the

reason I was talking to Bill is, that I'm concerned that the concept of plenary power, which we use in this committee and has been used over and over in these proceedings prior to this, that we seem to have missed that, at least in our lifetimes, it's been purely a sense of, "This judgment that has been signed is going to be final. We're not going to indefinitely delay the finality, enforceability and appealability of a judgment." And if there's no motion for new trial, then the power ends after 30 days. If there is a motion for new trial, it's going to be 75 days. If it's been timely filed, you can tack 30 days onto the end of that.

But there's a specific period of time in which the judgment that has been signed is going to become final. That is the point -- and as far as I can tell, the only reason God created plenary power. That's the only reason it exists. And as Sarah said, "Once the judgment is set aside, then there is full power." That's the federal system. I'm not convinced the federal system is bad, you know. I'm not convinced that one case means the federal system is bad.

And I see two sides to this argument. I see the family law side in which the problem is

circumstances are changing as the more time that goes along. I also see -- I mean, Chip, you've been in cases in which it costs a half million dollars to try the case -- I mean, just the trial cost a half million dollars. And I can see that kind of case in which you get up to the lip of trial, even if it's a year later and you're about to have this hemorrhage of attorneys' fees and tying up the time of the court, et cetera, that's inefficient. And in pretrial you figure out or have mercy if we've just disregarded one jury finding, we've got a verdict, you know. And that jury finding should have been disregarded. We're going to enter judgment.

So the question is, "Are we going to impose a limit," and then "What factors do we take into account in doing the balancing act of saying 30 days, 90 days beginning of evidence?" That, I think, we need too think about and sleep on.

CHAIRMAN BABCOCK: Yeah. You think we need to study it more?

MR. WATSON: I think we need to sleep on it at least overnight. I don't think we're ready to vote on "39" or "120" or "beginning of evidence" now.

CHAIRMAN BABCOCK: Yeah, Stephen.

MR. TIPPS: Well, I think there aren't

any circumstances in which you ought to be able to ungrant a new trial after you have commenced evidence in a new trial. So my preference would be for a standard that says, "You can't set it aside after the expiration of blank days or the commencement of evidence in the second trial, whichever comes first." And I tend to agree with Nina, that the right number of days is 60 or 90 or something like that, which would be a sufficient amount of time to allow the judge to decide he's made a mistake.

CHAIRMAN BABCOCK: Anybody else?

(No verbal response)

CHAIRMAN BABCOCK: What's the sense of everybody? Do we want to try to come up with a time period now or do we want to defer that -- let me tell you where I'm headed. The only item on our agenda that we have left, I think, is a relatively timewise minor one, which is the Rule 103, Rule 536.

Richard, do you disagree that that's going to not take very long?

MR. ORSINGER: Yeah. What I want is a sense of the committee kind of thing right now to decide whether we want to invest a lot of time and effort. I can summarize it in three minutes.

CHAIRMAN BABCOCK: Go.

MR. ORSINGER: Those of you remember from previous discussions, the private process servers are troubled, especially now that there are some companies that have a large organization. They're troubled about the fact that private process has to be approved by the court that issues the process and not by anybody in the county where the process is being served.

So let's take Travis County. There's lots of lawsuits that have to get served on the State of Texas. And a process server who's living in Travis County, under the best of circumstances, would go get approved to serve process countywide in Travis, but that's not the way it works. If the lawsuit is out of El Paso, he's got to get permission from the El Paso court to serve in Travis County. If it's out of Dallas, he's got to get to the Dallas court to get permission. If it's out of Houston, he goes to the Houston court.

And so if you're in a community and you're getting processed all the time and you're serving it and the process is coming from other counties, in order to serve that process, you have to go to the other county and meet their requirements. There's not any uniformity in those counties. And

some of them require insurance. Some of them require seven hours of training, but the training is done on a voluntary basis by the Houston Young Lawyers Association and they will not tell you more than two weeks in advance when they're going to have it. Other counties charge a fee to do it; others don't charge anything.

They want some kind of regulation where they can comply with a set standard, one time with one authority, and then they can serve process anywhere in Texas. They've been to the legislature several time to be able to do that with varying degrees of success. One time they got a bill out of both houses but it was vetoed by the governor. And so they've now come to the Supreme Court and said, "Well, can you guys help us because Rule 103 is the rule that permits private process servers anyway?"

And what they're looking for is some kind of uniform standard adopted by the Supreme Court of Texas saying that, "If you meet this standard, then you're authorized to serve process anywhere in Texas no matter which Texas court it came out of." You don't have to go to the sending court to get approval and that means you're driving across the state and meeting with all of these requirements.

The problem is, first of all, that looks legislative and not rulemaking, even though it is, in fact, in a rule.*rB And secondly, the Supreme Court doesn't have the authority to create an administrative agency and it doesn't have the money to fund it. So you'd think, "Well, probably the most the Supreme Court can do," and this is, frankly, where I've gone, is to say "Let's look and send a task force out, like my subcommittee and let's look and see what all the standards are: Seven hours here, background check. If you've got a felony or misdemeanor or moral turpitude, you can't do it. You've got to be over 18," whatever. Let's canvas what all of the requirements are.

And then this is my suggestion that makes a compromise possible, that let's take all of the most onerous standards that exist anywhere in Texas. And let's say that if you meet this amalgamation of onerous standards, you can go to any district clerk or county clerk in Texas and prove that you've met these standards. You know, $300,000 insurance, that's the highest insurance anyone requested. Seven hours of class, that's the most hours anyone requested. I meet all of these requirements. You prove it to a clerk. And then

pursuant to that local political situation, you get a court order out of that court and that order authorizes you to serve process for all -- issued by all courts in Texas anywhere in Texas.

Now, the reason why I think that's politically possible is because Bexar County wants $300,000 insurance, so they're not going to like a standard that doesn't require insurance. Other counties don't require insurance. But we're not forcing them, necessarily. What we're saying is that if someone does meet the most onerous standards, they're authorized statewide. If they're not going to meet these conglomerated onerous standards, then they have to go to the individual court and get permission. And if the courts wish to allow felons to serve their process out of their court, they can if they want to, but no one else is required to --

HONORABLE SCOTT BRISTER: Why not? Why not let felons -- I means, felons have got to do something.

(Laughter)

HONORABLE SCOTT BRISTER: A lot of the people we're trying to serve are felons. It takes one to find one. It takes one to find one.

(Laughter)

HONORABLE SCOTT BRISTER: I mean, this sounds to me like certifying barbers. I mean, you know -- and the way -- in the guise of protecting the public, a group creates a monopoly for them to make more money. I just -- this whole thing offends my free market sense. And I understand you're saying, "Well, Harris County won't be forced to," but practically they will. The floor will become a ceiling.

MR. ORSINGER: No. Well, there isn't a floor. The ceiling -- basically, the ceiling would be, "If you meet these standards, you have met or exceeded any standard that exists for any court in Texas. And if you're willing do that and capable of doing that, we'll authorize you one judicial act good statewide. If you're less than this maximum standard, then you're going to fall back on meeting the local standards for that court."

CHAIRMAN BABCOCK: But what Judge Brister's point is is that no clerk of a county --

HONORABLE SCOTT BRISTER: People in Houston will have to meet San Antonio standards if they want to serve in San Antonio.

CHAIRMAN BABCOCK: Because you're going to have a news report saying, "We've got all of these

private process servers in Harris County that don't meet the standards promulgated by the Texas Supreme Court." No clerk is going to do that.

HONORABLE SARAH DUNCAN: I thought what Richard was saying is, "We have a set of standards. If a private process server meets that standard, they can serve anywhere in the state."

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: That doesn't require Harris County to adopt those standards. Harris County can still permit people to serve process in its county without meeting those onerous standards.

CHAIRMAN BABCOCK: Right. And my point is, as a practical matter, no public official is going to risk the adverse publicity of saying, "I've allowed a bunch of felonious process servers out there," you know, "who are child abusers, who have no insurance, to go out and serve private process when the Supreme Court has set standards." It's not going to happen.

HONORABLE SCOTT BRISTER: And second, it allows whoever is the most outrageously monopolistic to say what the standard is going to be for the state.

MR. ORSINGER: Wait a minute. The standards are set --

HONORABLE SCOTT BRISTER: Because

whoever says it's the most, that's going to be --

MR. ORSINGER: The standards are set by the local judges, not by some private agency -- not by a private process server organization.

HONORABLE SCOTT BRISTER: Right. But there are counties --

MR. ORSINGER: Let me tell you, if you want to go out there and say, "It is not fair to say that in order to have a blanket order you've got to have $300,000 worth of insurance," and we want to promulgate a rule that says, "You only have to have $50,000 worth of insurance," when you take it to Dallas, under 100, or to San Antonio, under 300, they're going to dislike that rule because their judges have gotten together already and said, "We want our private process servers to have $300,000." So you have a political problem of cramming down a lower standard on counties around the state than the judges themselves would like on process out of their courts.

CHAIRMAN BABCOCK: Yeah. You're right about that. But Judge Brister is also right, I think, if I understand his point, is that the counties that have laxer standards now, I mean, they're going to be upset because they're going to be forced to move up to our standard. You're going to create a statewide

standard. It may be a real tough one. It may be a good idea. But don't be confused that you're going to set a statewide standard.

HONORABLE SARAH DUNCAN: You're not going to set a statewide standard. What you may do is create heat on the Harris County officials who are letting felons with no insurance serve process.

HONORABLE SCOTT BRISTER: Who's collecting all of these civil processor's insurance that you have to have? I mean, what are these people doing? Nothing. This is just a scam to make it more expensive. Why do you want to make it more expensive? So you have less competition.

Look, if you want to just make it expensive, let's just go back to the world where only constables can do it. You can always sue the county if the constable does it. But why did we switch that? Because it was slow and expensive, like all monopolies are.

JUSTICE HECHT: But the private processors' point now is, "We can't continue to" -- "I mean it's hugely more expensive for us now to meet the requirements of multiple counties."

HONORABLE SCOTT BRISTER: I don't have any problem if the Supreme Court said, "Instead of

applying to Harris County and San Antonio and whereever else, apply to Austin," and you-all can sign these thousands of orders every year. More power to you. I mean, this is a big administrative headache because --

JUSTICE HECHT: The chiefs are a little more belligerent than I remember them being.

(Laughter)

HONORABLE SCOTT BRISTER: You-all want to keep the list that grants these people? And you have to keep a list, because if somebody lies on a default judgment, you've got to strike them off the list. So somebody has got to keep track of a list. And I think it makes perfect sense for somebody in the state to do that rather than all 254 counties.

MR. ORSINGER: But who is that going to be and where are we going to pay their salaries? Is the Supreme Court clerk going to do it or is it the clerk at your Court of Appeals that's going to do it?

HONORABLE SCOTT BRISTER: It's not going to be any more expensive if one person does it rather than 254.

CHAIRMAN BABCOCK: But, of course, if we get into paying money, then that's a legislative thing, it seems to me.

MR. ORSINGER: Well, it may be that there's a district clerk somewhere, like in Travis County, that's willing to do this administrative load for free, but, you know, I haven't checked that out, and I will if you want me to.

I'll just say this, if we want to adopt statewide standards, I think it makes sense, because, unfortunately, normally, you can get an order out of your locale that allows you to do business in your locale. Under this scenario, you have to get an order out of everywhere in creation in order to do business in your locale. So it makes no sense.

If we have a uniform standard, it's going to work better. And maybe it needs to be lower than Bexar County wants it to be and maybe it doesn't need to be seven hours like Harris County wants. On the other hand, if you go to these counties and tell them, "You're only going to get three hours of training. You're going to get no felons, but you can get people with misdemeanors with moral turpitude and they don't have to be US citizens," you're going to catch some flack; the Supreme Court isn't going to want to be cramming that rule down on everybody.

HONORABLE SCOTT BRISTER: You're only addressing an Austin problem. In other words, if you

get approved by Harris County courts, you can serve process on a Harris County case in Timbuktu. The rules specifically say that, you can serve anywhere in the world on a Harris County case.

MR. ORSINGER: That's right. Scott --

HONORABLE SCOTT BRISTER: What this guy is complaining about is, he's in Austin and he wants to take over serving the Secretary of State.

MR. ORSINGER: No. That isn't right. You've got the same problem -- first of all, he's got process servers in all of the big counties. And secondly, not every piece of process that's served in Harris County is issued out of a Harris County court. Some of them are issued out of Dallas County courts. Some of them are issued out of courts in outer lying counties like Fort Bend, or, you know, up in Conroe.

So here you are in Harris County and maybe 50 percent or 80 percent of what you do is issued by Harris County court and all of a sudden here comes a piece of process from El Paso County. So that means you've got to get in the car and go over there and file an application and pay them $15 and then drive back to Houston so that now you can go back and serve El Paso process in Houston.

HONORABLE SCOTT BRISTER: Most people in

El Paso, I assume, aren't calling up private process servers in Houston to serve their El Paso cases.

MR. ORSINGER: Sure, they are.

HONORABLE SCOTT BRISTER: If you are a statewide agency, like this guy apparently is, so that he wants -- you know, he gets referrals for business in El Paso and wants to call his Houston office and tell them to serve it, but to do that he's got to get his Houston people to come get approved in El Paso -- I understand that problem -- but that's not most people. Most people use local private process servers to serve these things.

CHAIRMAN BABCOCK: Well, let 's go back to our assignment. Justice Hecht, is the court interested in our committee not only answering the question of whether we think statewide standards are a good idea but also giving the court a list of statewide standards? Is it interested in both questions or you just kind of what to know whether we think it's a good idea or not?

JUSTICE HECHT: No. We're interested in both. I think there is some concern that process serving -- official process serving is something of an artifact that is more expensive than it needs to be. And the history -- the development in the last couple

of decades, certainly in the federal courts and in other courts, has been to try to simplify that or else require people who want officially -- process officially served, to pay the extra burden of that.

I think that -- it seems like the federal courts, don't they require you to accept service, and if you don't accept service, then you've got to pay for the marshall to come find you.

CHAIRMAN BABCOCK: You have to sign a waiver of service and get some extra time to answer. And if you don't do that, the court can make you pay for getting service.

JUSTICE HECHT: So I do think that the market seems to think that private processors are either more dependable or cheaper or whatever -- and quicker, and that we ought to do something to facilitate it. And I think they have a legitimate complaint that they're getting whipsawed in 254 counties having different requirements at different places.

And as I understood the representation, it was, "Look, we'll do whatever it takes, reasonably, but then we want to be able to do it statewide." So whatever we can do to achieve that I think would be good.

MR. ORSINGER: Let me ask this. Does the court -- I mean, I've been on this committee long enough to know that if you adopt a rule and the district judges get mad about it, that changes everything. And so, do you want us --

(Laughter)

CHAIRMAN BABCOCK: They adopt one or consider one?

MR. ORSINGER: What?

CHAIRMAN BABCOCK: Consider one.

MR. ORSINGER: Oh, consider or promulgate a proposed rule that the district judges get mad about.

Now, I don't know whether they're going to get mad, but I assume they will. So if we adopt standards that are lower than some of the big counties agreed upon standards where the district judges have gotten together, we'll get some negative feedback.

CHAIRMAN BABCOCK: You've got both problems, Richard. You've got standards that are too low and standards that are too high, because there will be some counties that say, "Wait a minute. I don't need a guy to come in here with $300,000 of insurance. I just don't need that. And yet you're going to give me political heat -- I'm going to catch

political heat if we don't comply with the Texas Supreme Court minimums." So you're going to get it both ways. Just be ready for that.

MR. ORSINGER: Should this subcommittee come up with its recommendations of what uniform standards would be in terms of education, criminal background, et cetera, et cetera? And then what do we do, bring it here and vote on it or are we supposed to run around and check with the district clerk of all of these counties and find out who's going to go nuclear?

JUSTICE HECHT: No. Let's first find out kind of what's going on, what the variations are. And then I think you should come up with what you think is reasonable, even if it's a lot lower than what some other courts are doing. And then we'll worry about the political problem, if there is one, after that.

MR. ORSINGER: Okay. So then the commission or this subcommittee is to get a sense or maybe even a summary of what the requirements are, make our own recommendation about what uniform standards would be and then perhaps adopt an amendment to Rule 103 that would implement those statewide and then let the committee discuss it?

CHAIRMAN BABCOCK: That's the idea.

HONORABLE SCOTT BRISTER: Don't overestimate the -- I know in Harris County the process was, of course, you initially say, "Well, should these guys have insurance? Should they not be felons?" The initial reaction, "Well, of course, they shouldn't be felons, and, of course, they should have insurance."

Then you start, "Well, of course, that's going to cost money and mean fewer people and it's going to be -- well, now wait a second." Don't read too much into what judges have done. This is not our expertise, you know. I mean, we are not the ones that are going to have to pay. You-all are the ones that use them. If the Bar all wants it to be cheap or expensive, frankly, it doesn't matter to me as long as they're doing their job.

CHAIRMAN BABCOCK: And be sure to consult with the pro-felon lobby, if you would.

(Laughter)

HONORABLE SCOTT BRISTER: They've got to do something.

CHAIRMAN BABCOCK: Okay. Wait a minute. Let me just say where we are right now. I think we are at the end of our agenda, which is a happy place to be, even though it's 5:30.

So Nina, you're going to tell Pam that we're not doing anything tomorrow and you might ask Pam to call Stephen Yelenosky because I know he was planning on coming back.

Anybody else planning on coming back that we know of that needs to get notice?

(No verbal response)

CHAIRMAN BABCOCK: Okay. Now, here's the agenda for next time, draft proposed, and you might have Pam look at this, too, because she was the one that really wanted this.

We will start out, as usual, with a status report from Justice Hecht giving us up-to-the-minute details, comprehensive look at what the court is doing on the rules. Then we'll go to Richard's Rule 103.536 statewide standards.

You've got almost three months to do this.

MR. ORSINGER: Okay. That ought to get us about halfway there.

CHAIRMAN BABCOCK: Then we will have parental notification rules with Justice McClure then we'll go to Rule 6 with Pam Baron. Then we will have the coverage of electronic media, which Orsinger's committee has got. And Chris, you'll get both Richard

and me the materials on that?

MR. GRIESEL: Yes.

CHAIRMAN BABCOCK: And then from there we will go to visiting judge peer review, which Justice Duncan's subcommittee has.

And you'll get her the materials on that.

Then we'll go to Rule 21, which is a Luke Soules issue, Richard, that you have let slide for lo of these many months.

MR. ORSINGER: I know I've done a bad job. What is it?

(Laughter)

CHAIRMAN BABCOCK: It's this little letter here dated January 2001.

MR. ORSINGER: I'm going to come read it over your shoulder.

CHAIRMAN BABCOCK: So you can have that letter. So we'll go to that.

Then we will have Justice Duncan on Rule 306a with the rewrite to (e)(5)(c) and (e)(5)(d). And then we will have Mr. Watson's rewrite of Rule 329b, Subparagraph (h).

MR. WATSON: Why is that last?

CHAIRMAN BABCOCK: Because we wanted to

keep you around late Friday.

(Laughter)

CHAIRMAN BABCOCK: And then on Saturday morning, the highlight of our next meeting, finishing off the JP rules.

I'll entertain amendments or suggestions regarding the agenda, but that's what we'll do next time. And if I hear a motion, we'll be in adjournment.

MR. TIPPS: Move.

MS. JENKINS: Move.

CHAIRMAN BABCOCK: I figured I'd hear that.

(Proceedings concluded at 5:30 p.m.)

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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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I, Patricia Gonzalez, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 2nd day of November, 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 $1,319.00 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 16th day of November, 2001.

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