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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

COPY

Taken before Anna L. Renken, a
Certified Shorthand Reporter in Travis County for
the State of Texas, on the 17th day of November,
2000, between the hours of 1:50 p.m. and 5:01
o'clock p.m. at the Texas Association of
Broadcasters, 502 E. 11th Street, Suite 200,
Austin, Texas 78701.

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1 (1:50 p.m.)

2 CHAIRMAN BABCOCK: Are we ready to get
3 back to work? Okay. We're back on the record
4 after our lunch break, although I see Richard
5 Orsinger out on the porch on a cell phone.

6 HONORABLE SARAH DUNCAN: With his phone.

7 CHAIRMAN BABCOCK: Yes. Looking very
8 good.

9 MR. EDWARDS: Go ahead. We'll get
10 through this docket.

11 MR. HATCHELL: Vote on everything.

12 CHAIRMAN BABCOCK: All right. We have
13 just taken a vote saying the magic language should
14 be "mandatory and necessary for the purpose of
15 appealability."

16 HONORABLE SARAH B. DUNCAN: And now I'd
17 like to backtrack and shut Richard up, even though
18 he's not here, and except family law cases from the
19 magic language requirement.

20 CHAIRMAN BABCOCK: I think --

21 MR. EDWARDS: Maybe we ought to get him
22 in.

23 CHAIRMAN BABCOCK: He's in favor of that,
24 I believe. But I think Justice Hecht maybe has
25 some thoughts about that.

1 MR. GILSTRAP: Get him in here.

2 CHAIRMAN BABCOCK: So but let's in his
3 absence let's talk about that.

4 HONORABLE SARAH B. DUNCAN: Because I'm
5 not convinced of it. Richard put out some
6 legitimate concerns about divorces and other
7 matters governed by the Court.

8 CHAIRMAN BABCOCK: Yes. I smelled that
9 there was a deal cut here.

10 HONORABLE SARAH B. DUNCAN: No deal. No
11 deal.

12 CHAIRMAN BABCOCK: Okay. Richard, why
13 should we pass a Rule that exempts by your count,
14 what, 60 percent of the cases from it?

15 MR. ORSINGER: Because what you're trying
16 to solve is a problem that affects one tenth of one
17 percent of the cases; but the Rule is going to have
18 a collateral effect on 60 percent of the cases.
19 That's one reason.

20 Secondly, it will actually create a lot of
21 personal misery in my opinion when people try to
22 sort through the legal and personal ramifications
23 of realizing that somebody's divorce just had a new
24 trial granted on it or whatever.

25 And thirdly, I don't know how the Family Law

1 Bar will react to this; but if other people feel as
2 strongly about it as I do, then they'll turn to the
3 legislature to amend the Family Code to make this
4 Rule not apply; and I think that that's not a good
5 way to do it, because the legislature is
6 not -- the statutes are not flexible.

7 And so there just have been occasions where
8 there is a recognition that the family law practice
9 is really fundamentally different that personal
10 injury and commercial litigation and that it should
11 be handled separately.

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: What would govern this if we
14 exclude them from --

15 CHAIRMAN BABCOCK: Speak up, Buddy. The
16 people over there can't hear you.

17 MR. LOW: What would govern family law
18 cases then if we say the Rule on judgments doesn't
19 apply? Can you not have judgments in family law?

20 MR. ORSINGER: No. We've got to have
21 judgments. I mean, we're doing just fine under the
22 Rules of Procedure the way they are; and I don't
23 know how you could allow us to continue to do what
24 we're doing.

25 MR. LOW: No. But what we're doing is

1 revamping that Rule; and then what we have then is
2 another Rule the way it reads now for family law.

3 MR. ORSINGER: That doesn't sound good.

4 MR. LOW: It doesn't. That's the reason
5 I'm raising it.

6 PROFESSOR DORSANEO: Here's how you do
7 it. If we work from the 300 draft, we would say
8 that "expressly" means by a final judgment clause
9 except in family law cases; and then "otherwise
10 expressly" would mean what it means now. Expressly
11 or by necessarily implication, the same Rules we
12 have now would still govern. The special Rule
13 requiring a more articulated expressed finalization
14 is the only thing that would be necessary in a
15 family law case.

16 CHAIRMAN BABCOCK: Joan.

17 MS. JENKINS: I hate to disagree with
18 Richard since we're the only two people in the room
19 that do any significant amount of family law; but
20 you know, it just seems to me that our judges
21 regularly review our decrees, our orders very
22 carefully, because they are constantly having to
23 make them enforceable for purposes of child support
24 and other issues. It just doesn't seem to me like
25 it's realistic to start carving out on something

1 that is going to be this basic to the law an entire
2 group of cases.

3 I mean, I understand Richard's concerns; but
4 I'm a little concerned about starting to carve up
5 the Rules of Procedure. I mean --

6 MR. ORSINGER: Joan, I don't think your
7 experience that your judges conscientiously read
8 the judgments is a statewide experience; and I will
9 tell you for sure it's not not true in Bexar
10 County, because our local protocol is if you have a
11 judgment that you want signed, you just take it in
12 to whoever the presiding judge is. And they don't
13 read anything; and they can't. I mean, they have a
14 stack this high of stuff that they sign
15 (indicating). They're hearing a trial and they're
16 signing all these orders and everything.

17 And, you know, in your court where you have
18 individually assigned cases and all that stuff
19 there may be more concern for that. Also and
20 Austin is the same way. They have a central
21 docket. And in the rural counties these guys are
22 riding circuits. They're picking criminal, you
23 know, capital murder trials and all this other
24 stuff. I'm not sure how carefully they read all
25 their judgments either.

1 So, you know, if you want, we can bring it up
2 with the Family Law Council that is meeting the
3 first weekend of December and report back.

4 CHAIRMAN BABCOCK: Let me see if I can
5 understand why you have such a violent opposition
6 to it, Richard.

7 MR. ORSINGER: I'm afraid that -- I can't
8 say this publicly; but let me see how I can say
9 this.

10 HONORABLE SARAH B. DUNCAN: You're on the
11 record.

12 MR. ORSINGER: A lot of family law cases
13 are handled by people who don't do a lot of CLE. A
14 lot of family law cases are handled by people who
15 have a \$500 fee to handle the whole divorce; and so
16 there is not a lot of hands-on, and there's not a
17 lot of penetration of these Rule changes; and then
18 add on top of that that we have a significant
19 number of pro se's who are writing their own
20 judgments without the help of any lawyers at all.

21 And if we adopt a Rule that could be
22 interpreted that the judgment is not final unless
23 it's got this magic language on it; and so
24 somebody, whether it is a pro se litigant or a
25 lawyer whose legal assistant who does 15 of these a

1 day, you know, doesn't have it on her Computer
2 Write or whoever, in three years there's going to
3 be some kind of issue over property division or
4 child support enforcement, and some clever lawyer
5 is going to come along and say "You don't even have
6 a final judgment here."

7 And what are the ramifications of that? It's
8 not -- is it modifiable? Is it not modifiable? Do
9 you file a motion to modify custody or child
10 support, or do you go back and file a motion for
11 new trial?

12 I don't have answers to all these questions;
13 but they're nightmare questions, I think, if it's
14 not final until it has the magic stamp and if the
15 family law practitioners and pro ses don't put the
16 magic language in their decree. That's what scares
17 me.

18 MR. YELENOSKY: So far we haven't said
19 anything about the finality, just appealability.

20 MR. ORSINGER: No. I mean the proposal
21 originally was finality. I think Sarah has
22 uncoupled that in her most recent motion, except
23 that probably nobody in this room can agree with
24 each other about what that motion meant. I mean,
25 you're over debating the opposite conclusions from

1 the same vote.

2 HONORABLE SARAH B. DUNCAN: That's why it
3 was such a good motion, Richard.

4 MR. YELENOSKY: The great compromiser.

5 CHAIRMAN BABCOCK: Judge Brown.

6 HONORABLE HARVEY G. BROWN: I'm not a
7 family judge; but it seems to me that I somewhat
8 disagree with the assumption that because the
9 quality of the lawyers may not be as good and there
10 are pro se litigants that a bright line Rule isn't
11 good. In fact, to me it seems to be exactly
12 opposite. To tell a pro se litigant how to file an
13 answer in my court is very easy. They take the
14 form book of general denial. To tell them how to
15 do it in federal court is a disaster. So I would
16 think that with less quality lawyers a bright line,
17 easy Rule that is going to be in all the form books
18 in a year is better. That is not worse; but I
19 could be wrong.

20 MR. ORSINGER: Out of the 70,000 lawyers
21 in this state we sell about 6,000 form books. So
22 what are the other 74,000 -- or 64,000 using?

23 CHAIRMAN BABCOCK: You should take a math
24 class. Carl.

25 MR. HAMILTON: I wonder if we could get

1 Hidalgo County exempt from this Rule.

2 CHAIRMAN BABCOCK: The quality of this
3 debate is --

4 PROFESSOR ALBRIGHT: I have to say at
5 lunch I began questioning. I originally thought
6 this was a good idea; but now I'm questioning how
7 this bright line Rule which only adds the language
8 "this a final appealable judgment," how it really
9 helps us from where we are now.

10 I agree that it would be nice to have that
11 language in there; but I wonder if you only have an
12 old fashioned Mother Hubbard Clause which we're
13 going to have in lots of judgments for a long time,
14 what happens to that? I mean, you have expressly
15 disposed of claims, and then you're going to say
16 that has no effect. Or we're going to argue about
17 the effect?

18 I'm just not sure all this is really going to
19 make our world any better than it is right now. I
20 agree our world isn't wonderful now, and it wasn't
21 wonderful before Mafridge; but I think it's a
22 problem that is really not solvable. There is no
23 perfect solution in the real satisfactory
24 solution. All of the solutions have problems; and
25 I'm just not sure that writing a Rule is going to

1 make the world a better place.

2 HONORABLE SARAH B. DUNCAN: Chip.

3 CHAIRMAN BABCOCK: Yes, Sarah.

4 HONORABLE SARAH B. DUNCAN: We didn't
5 vote on specific language. We only voted on, and I
6 like Nina's terminology, "neon." And we voted to
7 have neon. And I think that does make the world a
8 better place for several reasons, chief among which
9 are two: For a lot of lawyers if it's not in the
10 Rules of Procedure, it pretty much doesn't exist,
11 because they're not out there reading the advanced
12 sheets every month and the Supreme Court Journal.
13 And two, it's a lot easier to look somebody in the
14 eye and say "This said it was a final appealable
15 judgment sufficient to start the appellate
16 timetable; you didn't appeal; you are out of
17 court," than to look at somebody and say "Gee,
18 there are about 10 Supreme Court cases and 20 Court
19 of Appeals cases that you need to read, and if you
20 had read those very carefully, you would understand
21 that this was a final judgment and you're out of
22 court." To me the notice aspect of having
23 something neon significantly improves our world.

24 PROFESSOR ALBRIGHT: But then the
25 question becomes what is the effect of no neon? Is

1 it are we saying that an old fashioned Mother
2 Hubbard clause is of no force and effect?

3 HONORABLE SARAH B. DUNCAN: Not under the
4 magic words that I would propose.

5 MR. WATSON: That's Scott's proposal.

6 CHAIRMAN BABCOCK: Okay. We've gotten a
7 little bit off the point, which is, do we exempt
8 family law cases from this, from the neon lights
9 and let them --

10 HONORABLE SARAH B. DUNCAN: And I'll put
11 on the record that I don't really have a position
12 on it.

13 CHAIRMAN BABCOCK: -- proceed in the
14 shadows? Bill.

15 PROFESSOR DORSANEO: I understand what
16 you're saying, Richard, is what would happen is
17 that somebody would come back, and it's a long time
18 later, and because there was some problem raised
19 about the property or whatever, that the decree of
20 divorce could be reversed and you've got to get
21 remarried to your ex spouse again.

22 MR. ORSINGER: Well, if you --

23 PROFESSOR DORSANEO: And then all the
24 property that was acquired post of the divorce is
25 subject to division and all of that. I want to

1 stay away from all of that.

2 HONORABLE SARAH B. DUNCAN: I think
3 people that have ex spouses should be able to vote
4 on this Rule.

5 MR. ORSINGER: If you uncouple finality
6 from appealability, your only risk is that an
7 appellate court might overturn your divorce; and if
8 they overturn your dissolution of marital bonds,
9 then your next marriage is void and your first
10 marriage has been continuing on, and your children
11 are illegitimate from your second marriage; but if
12 they don't overturn the dissolution of marital
13 bonds and all they overturn is the property
14 division, hey, that's no problem. That just means
15 that you have two wives to split everything with
16 instead of one.

17 PROFESSOR DORSANEO: Different time
18 periods?

19 MR. ORSINGER: No. The same time period,
20 because the second one is a putative wife, and
21 she's entitled to half of what you acquired; but
22 the other one is entitled to half of what you
23 acquired. So the question is whether you get
24 nothing or one quarter.

25 CHAIRMAN BABCOCK: With the Family Law

1 Advisory Council we'll get into this more. Carl.

2 MR. HAMILTON: That just illustrates the
3 problem that exists in other cases as well, because
4 if you don't have the magic words in there and the
5 timetable doesn't start running, then the
6 preliminary power of the trial court remains, so
7 you may have a judgment that two or three years
8 later some judge decides to grant a new trial in,
9 so there's no finality to anything as long as it's
10 still open. And it's the same thing in family law;
11 but it's the same way in other cases too.

12 CHAIRMAN BABCOCK: But if the magic
13 language is in neon, I mean, if it says you have
14 got to have this that says it's a final judgment,
15 isn't it your fault in some fashion for not having
16 it there?

17 MR. HAMILTON: Well, but you may have a
18 Plaintiff who wins the judgment and prepares a
19 judgment and sends it over to the trial court and
20 signs it without the magic language in there,
21 because he wants to attempt to levy execution on
22 the property. And if he does, the Defendant is
23 hamstrung. He can't appeal. He can't supersede.
24 So there is going to be mischief in playing with
25 the language, I can guarantee you.

1 CHAIRMAN BABCOCK: And he can't appeal
2 because the magic language is not there; but he
3 could go down to the court and say "Hey, Judge, you
4 have got to put the magic language in here."

5 MR. HAMILTON: He may get a hearing in 60
6 days or 90 days. The judge may say "I've already
7 signed the judgment."

8 CHAIRMAN BABCOCK: Now that may be a
9 problem in coupling the thing.

10 MR. ORSINGER: I think we were debating
11 this during the break. But Sarah's motion didn't
12 say you couldn't appeal it. It just said that the
13 appellate timetables weren't running against you.
14 So if the Plaintiff got execution out, under
15 Sarah's motion I believe that the Defendant could
16 say "Well, my timetable may not be running against
17 me; but here is my notice of appeal, and here is my
18 supersedeas bond. We're on."

19 HONORABLE SARAH B. DUNCAN: I think there
20 is also case law that a judgment isn't subject to
21 supersedeas until it's appealable; and I think that
22 arises out of the finality issue; but whichever
23 side you represent at least one of the parties is
24 going to have a strong incentive to get the magic
25 language into the judgment; and I think that's

1 going to happen. I think the trial judges are also
2 going to have a strong incentive to get the magic
3 language into the judgment.

4 So what I think is going to happen is more
5 times than not we're going to end up with the magic
6 language in the judgment, and everybody is going to
7 tick along. What is not going to happen is that
8 people who don't realize they have got a final
9 appealable judgment don't appeal and lose their
10 right to appeal.

11 CHAIRMAN BABCOCK: Which is the evil
12 you're trying to fix.

13 HONORABLE SARAH B. DUNCAN: Which is the
14 evil.

15 CHAIRMAN BABCOCK: Yes. Because Bonnie
16 is not going to add to the statistics of the trial
17 judge that they have disposed of the case until she
18 sees magic language. Right, Bonnie?

19 MS. WOLBRUECK: That's right.

20 CHAIRMAN BABCOCK: So this makes it
21 easier for her. She's happy about it. And then
22 when the judge sees his docket swelling and comes
23 to Bonnie and says "How come my docket is
24 swelling," and she says "You don't apparently" --

25 HONORABLE SARAH B. DUNCAN: "You forgot

1 your stamp."

2 CHAIRMAN BABCOCK: "You don't know about
3 the magic language. I'll get a stamp for you if
4 you want." Nina and then Bill.

5 MS. CORTELL: It also seems to me that
6 you are not able to execute on it until it has the
7 magic language either. I'm not -- that's sort of
8 the uncoupling objection I had earlier. I didn't
9 understand that I was voting for separating them
10 out final for no purpose, not this purpose, and not
11 that purpose, that we were separating out to a get
12 a concept set and we would deal separately. I
13 don't think you should be able to execute on
14 something that is not appealable.

15 CHAIRMAN BABCOCK: Well, yes. Although
16 the issue is still open about whether it is
17 appealable even though there is no magic language.

18 HONORABLE SARAH B. DUNCAN: Can we vote
19 on the -- I have some specific language I'd like to
20 propose that I think addresses that. Can we vote
21 on whether we're going to except family law cases?

22 CHAIRMAN BABCOCK: Yes. Let's finish
23 that discussion. Justice Hecht, while you were out
24 Richard made the remarkable proposition that this
25 Rule should be, the family law cases should be

1 exempted.

2 MR. ORSINGER: Actually that was Sarah's
3 suggestion. Not mine.

4 CHAIRMAN BABCOCK: You weren't here. She
5 took no opinion, had no opinion on it. I know you
6 probably have some thoughts on that.

7 JUSTICE NATHAN HECHT: Well, you know,
8 generally we would like to keep the Rules as
9 uniform as we can, although family law is half our
10 docket, and they do present problems that not all
11 other civil litigation share. So I mean, I'm sure
12 the Court would like to know what the
13 recommendation of the Committee is; but generally
14 speaking we would hate to separate out family law
15 or Hidalgo County or anything else for that matter;
16 but there may be compelling reasons to go there.

17 CHAIRMAN BABCOCK: Buddy.

18 MR. LOW: Richard, let me be sure I
19 understand. You're saying that some lawyer that
20 doesn't know what he's doing might not put the
21 magic language in there, and then it would be
22 pending for a long time, and you might set things
23 aside. What if he doesn't conclude all the issues
24 to make it that way, he didn't know how to do
25 that?

1 MR. ORSINGER: That is not happening
2 right now. I mean, I just don't ever see instances
3 of interlocutory decrees of divorce; but when we
4 put this magic language as a requirement to make it
5 noninterlocutory I fear we're going to see
6 thousands of them. I may be wrong; but this whole
7 problem doesn't exist in family law. It exists in
8 multiple party case where you have individual
9 dispositions of claims and litigants. We don't
10 have that problem in family law. We're doing just
11 fine in family law. You're about to turn it on its
12 head. That's all I'm saying.

13 MR. LOW: The grandparents come in, and
14 they want custody, and they're suing for custody
15 and so forth; and you litigate, and you get -- you
16 dispose, so you do have more than just the husband
17 and wife. You know, they might give somebody else
18 custody, or so you have other parties. Now, if the
19 judge decrees that the divorce is final, but you
20 have got all this other pending, what do you do
21 then?

22 MR. ORSINGER: In a family law case you
23 don't usually have multiple parties who are taken
24 out pretrial. If you have grandparents that are
25 going after custody, you pick a jury. Everybody

1 litigates everything. Somebody wins a jury
2 verdict, and you get a judgment. We don't have a
3 problem with decrees being interlocutory because
4 somebody had some of their claims granted or some
5 people were dismissed out of the lawsuit before the
6 final trial.

7 MR. LOW: You don't have a judge where he
8 may say "Okay. The parties agree with respect to
9 property, and we agree that to grant the divorce
10 because he wants to get married in 30 days and I do
11 too," and then have the other still pending? That
12 doesn't happen?

13 MR. ORSINGER: You cannot according to
14 case law you cannot sever or separate or
15 individually rule on the dissolution of marital
16 bonds in the property division. If you tried to do
17 that, it's meaningless.

18 MR. LOW: Your property, you have agreed
19 on that. All you have got is custody.

20 MR. ORSINGER: All you have got is
21 custody. I'd say about half of the judges in Texas
22 think that you can grant an order severing the
23 custody case, have a new cause number, and let the
24 divorce go final. The other half don't think
25 that.

1 MR. LOW: It sounds like there is some
2 confusion.

3 MR. ORSINGER: There is some confusion.
4 If you don't sever, it's clear that it's all
5 interlocutory. In other words, like in Houston,
6 for example, in Houston how long does it take to
7 get a jury trial on a custody case in Houston?

8 MS. JENKINS: A year.

9 CHAIRMAN BABCOCK: Judge Brister, did you
10 have something?

11 MR. ORSINGER: About a year. Okay.
12 You're not divorced even if you get up there and
13 the judge says "You're divorced and here is your
14 property division." If you haven't settled the
15 kids issue, you're still married.

16 MR. LOW: I mean, even if he puts in the
17 order and says "Decree of Divorce"?

18 MR. ORSINGER: Yes.

19 MR. LOW: Good Lord of mercy.

20 CHAIRMAN BABCOCK: Judge Brister, did you
21 have a comment?

22 HONORABLE SCOTT A. BRISTER: Especially
23 for the pro se or unprofessional litigator it
24 certainly seems to be no problem having a postcard
25 say "This is the final judgment and your time to

1 appeal, 30 days appeal starts from this day,
2 X date," which is what we're talking about trying
3 to send out to people so that there is no longer a
4 question when the appellate timetable is starting
5 to run, and nobody can say "I've been trapped by
6 language that I didn't understand" and have a
7 reasonable argument from the context of all the
8 different pleadings and things that were going on,
9 have a reasonable argument that "I didn't know it
10 was final."

11 MS. JENKINS: My question back to
12 Judge Brister is what postcard are you going to
13 send that litigant who has gone down, their lawyer
14 has presented the decree of divorce to the judge,
15 the judge has pronounced the divorce, signed the
16 decree in front of them, but there's no magic
17 language? Is the postcard then going to say "You
18 have an interlocutory order. You cannot appeal
19 from this order"?

20 HONORABLE SCOTT A. BRISTER: Well, I
21 mean, whatever it --

22 MS. JENKINS: I mean, if you're talking
23 about notice, --

24 HONORABLE SCOTT A. BRISTER: I mean,
25 that -- to me that --

1 MS. JENKINS: -- I think that notice is
2 just as important.

3 HONORABLE SCOTT A. BRISTER: So they
4 think and they appeal too early. How bad does that
5 hurt them? Appealing too early is not a problem.
6 Appealing too late is a problem.

7 MS. JENKINS: I'm saying I'm concerned
8 about this person who doesn't understand that they
9 have an interlocutory order because the lawyer has
10 made a mistake. Are we going to tell them that?

11 HONORABLE SCOTT A. BRISTER: We have a
12 lot of people wanting to do interlocutory orders.
13 And as a new appellate judge I think they are a
14 terrible idea to have a bunch of interlocutory
15 orders coming up all the time. Wait until it's all
16 done. But, you know, again that is a separate
17 question. If people appeal when it's too early,
18 well, you know, they need to be --

19 CHAIRMAN BABCOCK: Steve.

20 MR. YELENOSKY: Well, but the fear there
21 is not to appeal too early. The fear is that
22 they'll just go away, and sometime later because
23 everybody keeps coupling the finality with the
24 appealability issue sometime later they'll find out
25 that they didn't have a final judgment --

1 MS. JENKINS: Exactly.

2 MR. YELENOSKY: -- and they aren't in
3 fact divorced.

4 HONORABLE SCOTT A. BRISTER: These are
5 not going to lay, last around forever. We are
6 going to have trial court standards. Within six
7 months every judge now gets a list every month, at
8 least in Harris County does, saying how many cases
9 over six months do you have, how many over 18
10 months, how many over three years. And in Harris
11 County the ones over three years are in big, bold
12 letters so you can see exactly who is stacking up a
13 bunch of old, stinky cases.

14 And, you know, I mean, I'm not sure who these
15 judges are who want to warehouse cases forever; but
16 my experience is most trial judges are in a hurry
17 to unload the cases. The problem is not getting
18 these judges to sign something to unload the
19 cases. I think most of us are more than happy to
20 do it, maybe too happy to do it sometimes; but if
21 we do it too early, the idea of sending out an
22 unambiguous notice is that you can -- somebody can
23 say "Hey, wait a minute. Oh, I didn't know about
24 that."

25 But, you know, it seems to me somebody has got

1 to decide the file is closed. It's time to
2 appeal. And we could have the clerk do that; but
3 the clerk is not in a position to do that. We can
4 have you do that; but you have an incentive to do
5 it too early or too late or that something helps
6 you to do it. So it's got to be me.

7 I do not -- I have files and I don't have time
8 to make sure. I've got 800 cases. I can't make
9 sure on every one of those that this really is. I
10 don't mind taking a minute and ask the clerk "Does
11 your computer show anything pending?" "No." "Okay.
12 That's it." But I may be wrong; but it seems like
13 I've got to be the one to start the process and say

14 I think we're wrong other than hoping that I'm
15 going to catch in these orders some Hubbard
16 language that is hidden away in there. I think
17 that's less likely.

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: Judge Brister, this has
20 come up several times. People seem to take a lot
21 of comfort in the idea that the judge's statistics
22 will be piling up and he'll figure out he has all
23 these judgments that aren't final. What does he do
24 when he finds out he has a lot of judgements?

25 HONORABLE SCOTT A. BRISTER: You send out

1 a notice. People call me and they say "We've
2 settled." I say "Fine. You've got days to get
3 your judgment in." And of course half of them do
4 not. The Plaintiff has got their money by then,
5 and the Defendant has got their Rule 11 Agreement.
6 They don't care about it. Thirty, sixty days send
7 out a notice saying. Fifty cases, I do this with
8 fifty cases a month. "It's in our hold for
9 judgment stack. If we don't have a final judgment,
10 I'm DWOPing it in 15 days."

11 MR. GILSTRAP: We're going to dismiss
12 it. And the problem with that scenario is now
13 under this approach we've got a 10-year old case
14 that was just DWOPed, and those people, that
15 judgment has gone away.

16 HONORABLE SCOTT A. BRISTER: The same
17 thing as the XXX order. You expect somebody if
18 they've gotten a notice saying "I'm going to DWOP
19 your case unless," even if they're pro se, even if
20 they're not a college graduate they understand "If
21 I don't do something, then the 'unless' happens."

22 MR. ORSINGER: What is going to happen is
23 the lawyer is going to get a DWOP notice. They are
24 going to say "That is a computer glitch. We got a
25 final decree signed on that three years ago.

1 Nobody shows up. They get DWOPed; and then
2 somewhere down the line they're going to find out
3 that not only was their divorce interlocutory,
4 their divorce was dismissed.

5 HONORABLE SCOTT A. BRISTER: If you ignore
6 the -- if you're going to cure, if we're trying to
7 cure the problem of people who ignore notices from
8 the Court, then we need to just take the Rule book
9 and toss it, because that's the purpose of the Rule
10 is this, "You're on notice, if you don't abide by
11 this, you're out. Sorry."

12 MR. ORSINGER: But, you know, we're
13 making a decision here that we have got all these
14 corporate lawyers that are working for 500-person
15 law firms and making \$400,000 a year that can't
16 figure out how to write a final judgment, or we've
17 got \$50,000, you know, average practitioners out
18 here that have a 250 caseload. And which ones of
19 these are going to pay the price for not reading
20 the Rule correctly? The one tenth of one percent,
21 you know, that has the multimillion dollar case
22 with multiple claims, or the other, you know,
23 60 percent of the litigation out there with people
24 that are not really paying that much attention to
25 details?

1 CHAIRMAN BABCOCK: Okay. As the advocate
2 of the Rule, you just got the last word. So now
3 we're going to vote on whether or not we're going
4 to exempt family law cases from having the magic
5 language be necessary to create or start the
6 appellate timetable. So everybody in favor of
7 Richard's proposal to exempt family law cases raise
8 your hand.

9 MS. JENKINS: And you turned me around.
10 Now Richard, raise your own hand.

11 MR. ORSINGER: What are we going to do
12 about not having a judgment? Buddy says we won't
13 have a judgment.

14 CHAIRMAN BABCOCK: Harvey, did you have
15 your hand up?

16 HONORABLE HARVEY G. BROWN: No.

17 CHAIRMAN BABCOCK: Everybody opposed?
18 Richard. Sorry. It fails 6 votes in favor with 20
19 against.

20 MR. ORSINGER: We'll see you guys in the
21 legislature.

22 CHAIRMAN BABCOCK: I would hope you would
23 not pursue that. Okay. Sarah, so now we've got
24 a --

25 HONORABLE SARAH B. DUNCAN: Now get to

1 specific language.

2 CHAIRMAN BABCOCK: -- concept for
3 everybody.

4 HONORABLE SARAH B. DUNCAN: And I would
5 like to propose Scott McCown's language with a
6 couple of little, tiny modifications.

7 CHAIRMAN BABCOCK: Okay. Are you talking
8 about all five paragraphs, or just (3) and (4)?

9 HONORABLE SARAH B. DUNCAN: No. I'm not
10 talking about (3). Either.

11 CHAIRMAN BABCOCK: You're not talking
12 about (3)?

13 HONORABLE HARVEY G. BROWN: Why not (3)?

14 HONORABLE SARAH B. DUNCAN: Okay, (3).
15 My concern is that we're going to start getting
16 into quibbles about titles of orders or judgments
17 conflicting with a final judgment clause at the end
18 and all that stuff. But okay. That's fine. We'll
19 do (3).

20 MR. WATSON: Not us.

21 HONORABLE SARAH B. DUNCAN: "A final
22 judgment should be labeled final judgment directly
23 below the caption and should have a final judgment
24 clause directly above the date and signature of the
25 judge."

1 HONORABLE SCOTT A. BRISTER: Why is it
2 you need --

3 HONORABLE SARAH B. DUNCAN: The final
4 judgment clause would read "This is a final
5 appealable judgment or order. All relief requested
6 in this case that is not expressly granted by
7 written order is denied."

8 CHAIRMAN BABCOCK: Okay. So that's the
9 proposed language for XXX, neon, magic language.
10 What does everybody think about that language?

11 MR. EDWARDS: On (3) when it says
12 "should" it is no longer mandatory and it's no
13 longer neon light.

14 MR. YELENOSKY: "Must."

15 HONORABLE SARAH B. DUNCAN: Ralph has
16 offered a friendly amendment that I think is a good
17 idea.

18 CHAIRMAN BABCOCK: Okay. What is that,
19 Ralph?

20 HONORABLE SARAH B. DUNCAN: "All relief
21 requested in this case that is not expressly
22 granted in this judgment or by prior signed order
23 is denied."

24 CHAIRMAN BABCOCK: "Prior written
25 order."

1 HONORABLE SARAH B. DUNCAN: "Prior
2 written order."

3 CHAIRMAN BABCOCK: Okay. Good. Now what
4 about "should" to "must" in paragraph (3)? "A
5 final judgment must be labeled," or "A final
6 judgment should be labeled"?

7 HONORABLE SARAH B. DUNCAN: I think the
8 whole, all of the "shoulds" are going to have to
9 change to "must" given our vote that it be
10 mandatory and exclusive.

11 CHAIRMAN BABCOCK: I agree with that.

12 MR. EDWARDS: "Must" or "shall."

13 CHAIRMAN BABCOCK: Is it "must" or
14 "shall"?

15 HONORABLE SARAH B. DUNCAN: "Must."

16 CHAIRMAN BABCOCK: "Must" is what we've
17 been using.

18 HONORABLE SCOTT A. BRISTER: "Shall" is
19 what they're doing in Florida. You don't want
20 "shall." It means you must, but you have
21 discretion not to.

22 (LAUGHTER.)

23 JUSTICE NATHAN HECHT: But so I
24 understand it, Sarah, the third, the sense of the
25 third paragraph is that a judgment is not final

1 unless; and the sense of the fourth paragraph is
2 again if and only if. It has to have this or it's
3 not going to be final.

4 PROFESSOR ALBRIGHT: Why don't we say it
5 that way? "A judgment is not final unless." I
6 think that makes it a whole lot clearer.

7 CHAIRMAN BABCOCK: Let's be able to read
8 what we have got so far. What we have so far is "A
9 final judgment must be labeled, quote, 'Final
10 Judgment' directly below the caption and must have
11 a final judgment clause directly above the date and
12 signature of the judge. Any order with a final
13 judgment clause in the following form is final for
14 the purposes of appeal: This is a final appealable
15 judgment. All relief requested in this case" --

16 HONORABLE SARAH B. DUNCAN: "Or order."

17 CHAIRMAN BABCOCK: Excuse me?

18 HONORABLE SARAH B. DUNCAN: "Or order."

19 CHAIRMAN BABCOCK: "Judgment or order."
20 Okay. Sorry. "This is a final appealable judgment
21 or order. All relief requested in this case that
22 is not expressly granted in this judgment or by
23 written order is denied."

24 MR. DUGGINS: "Prior."

25 CHAIRMAN BABCOCK: "Prior." Sorry. "By

1 prior written order is denied."

2 Okay. Now do we want to change that? Carl.

3 MR. HAMILTON: I thought we had some
4 language. At one time we were talking about if
5 this order were conflicted or was inconsistent with
6 any prior order, that this controlled.

7 HONORABLE SARAH B. DUNCAN: That's part
8 of why I was not proposing the third paragraph in
9 Scott's suggestion. I would like to just agree on
10 the language that is going to go in the final
11 judgment clause, and then you-all send it back to
12 our subcommittee and let us come back with a Rule
13 that incorporates all of the things it needs to
14 incorporate; but I think the flashpoint I think is
15 the language in the final judgment clause.

16 CHAIRMAN BABCOCK: Okay. So you want to
17 take (3) off the table for the time being?

18 HONORABLE SARAH B. DUNCAN: Uh-huh
19 (yes).

20 CHAIRMAN BABCOCK: All right. So we're
21 just considering paragraph (4), which is "Any order
22 with a final judgment clause in the" --

23 HONORABLE SARAH B. DUNCAN: I wouldn't
24 even include that sentence, because that sentence
25 may not be, as Alex said, it might be more clearly

1 understandable if it says "A judgment is not final
2 for purposes of appeal unless it contains the
3 following clause: "

4 All I'm suggesting is don't hem us into what
5 the whole Rule will ultimately look like, if we can
6 just vote on the magic language.

7 CHAIRMAN BABCOCK: All right. So let's
8 drop down to then the magic language, the neon,
9 XXX. "This is a final appealable judgment or
10 order. All relief requested in this case that is
11 not expressly granted in this judgment or by prior
12 written order is denied." Yes, Stephen.

13 MR. YELENOSKY: Well, when you had
14 proposed (3), one way to read what you had proposed
15 was part of the magic language was the "Final
16 Judgment" title after the caption. So my question
17 is, if we're voting on final language, we need to
18 vote on whether that's part of the final language.
19 It wasn't clear in Scott's proposal, because Scott
20 wasn't proposing --

21 HONORABLE SARAH B. DUNCAN: Right.

22 MR. YELENOSKY: -- magic language that was
23 both necessary and sufficient. He was proposing
24 what was sufficient. So now we need to decide
25 whether both of those things are necessary and

1 sufficient.

2 CHAIRMAN BABCOCK: Good point. Elaine.

3 PROFESSOR CARLSON: So does the magic
4 language apply to interlocutory orders?

5 MR. GILSTRAP: If you want to make them
6 final, it does.

7 MR. ORSINGER: This is a judgment rule.

8 PROFESSOR CARLSON: But we're not saying
9 that --

10 HONORABLE SCOTT A. BRISTER: No. No.
11 No. No. If you deny class certification, it
12 doesn't have to have this in it.

13 PROFESSOR CARLSON: This clause does not
14 apply.

15 MR. ORSINGER: You can't say that.
16 They're not final.

17 HONORABLE SCOTT A. BRISTER: They're not
18 at all final.

19 CHAIRMAN BABCOCK: But you can appeal
20 them.

21 JUSTICE NATHAN HECHT: But what we have
22 not dealt with and we need to do something with are
23 the cases where you have multiple final orders such
24 as probate, guardianship issues.

25 HONORABLE SARAH B. DUNCAN: I think this

1 would cover those.

2 JUSTICE NATHAN HECHT: No, because --

3 HONORABLE SCOTT A. BRISTER: "All relief
4 requested in this case," what does that mean?

5 JUSTICE NATHAN HECHT: Just because the
6 judgment -- a trial judge might not think that an
7 order denying guardian attorney fees is a final
8 judgment; but the Court of Appeals may disagree.

9 PROFESSOR DORSANEO: To get all that
10 accomplished then you have to go back to something
11 like the draft that we had and give a definition of
12 final judgment, disposes of all parties at issue,
13 and then say expressly by adding this clause or by
14 necessary implication and just modify our prior law
15 by adding the sentence. You can't just treat the
16 sentence as the solution.

17 CHAIRMAN BABCOCK: Judge Brown.

18 HONORABLE HARVEY G. BROWN: If this is to
19 be a neon, it seems to me that we should require
20 that the clause be placed in a particular place.
21 In other words, I do think it should be the very
22 last thing before the signature line. I think
23 that's part of the problem with federal court
24 judgments, because you don't know where that
25 language is going to be sometimes. It's certainly

1 easier for the clerk if they know exactly where to
2 look, because I do think we should include that
3 part of paragraph (3).

4 CHAIRMAN BABCOCK: Alex.

5 PROFESSOR ALBRIGHT: But then if it's in
6 there, but it's the next to the last paragraph,
7 does that mean it's noneffective because this is
8 not a final judgment?

9 HONORABLE SCOTT A. BRISTER: The clerk
10 can check that, and the clerk can call them and say
11 the same as they do, "You don't have a certificates
12 of conference on this. I'm not giving it to the
13 judge."

14 MR. YELENOSKY: Why not make it the first
15 sentence?

16 PROFESSOR DORSANEO: Make it in bold
17 font. Don't make it last.

18 HONORABLE SCOTT A. BRISTER: How about
19 can you make it first? "The following is a final
20 order unless" --

21 MR. YELENOSKY: And then you have the
22 title, and you can say that all final judgments
23 must begin with this title in the first sentence.

24 HONORABLE SCOTT A. BRISTER: I like that.

25 PROFESSOR ALBRIGHT: That means that the

1 misnomer rule does not apply to these, if a witness
2 is misnamed in a pleading or something, then you
3 assume it's the right one. It means that I put it
4 in there; but I didn't put it in the right place.
5 Then I don't have a final judgment. I mean --

6 HONORABLE SARAH B. DUNCAN: To me all of
7 these are separate issues.

8 MR. YELENOSKY: Magic only works when you
9 get it exactly right.

10 HONORABLE SCOTT A. BRISTER: But your
11 case is it's in the wrong place. The judge does
12 sign it in the wrong place. Because the purpose is
13 notice, I don't think that ought to be effective.
14 It ought to have to be in the right place. That's
15 the whole purpose of the deal.

16 PROFESSOR ALBRIGHT: But if I try to
17 appeal the judgment, and the only thing that
18 happens is it gets bounced back, --

19 HONORABLE SCOTT A. BRISTER: But in
20 actuality --

21 PROFESSOR ALBRIGHT: -- the judge has to
22 sign a new order.

23 HONORABLE SARAH B. DUNCAN: Actually what
24 we'd probably do is just abate and tell you. If
25 placement is going to be critical, then I think

1 what most Courts would do is just abate and say
2 "Your placement is wrong. Go get it right."

3 HONORABLE SCOTT A. BRISTER: In actuality
4 the clerk is going to say "This is not a final
5 judgment because the first sentence is not right.
6 Pick up the phone and get one where it is in the
7 right place."

8 MR. JEFFERSON: When would the 329(b)
9 deadline begin to run? Would it be only from the
10 time that magic language was in there, or would it
11 be -- so it wouldn't be from the time that today it
12 is a final judgment and all parties and all matters
13 are resolved.

14 HONORABLE SARAH B. DUNCAN: Right.

15 MR. JEFFERSON: So you could have what is
16 in today's terms a final judgment on day one and
17 not have any obligation of the final motion for new
18 trial until day 100 or whatever that, 30 days after
19 that language is added. And during that time there
20 couldn't be execution on the what today again is a
21 final judgment, because it's not appealable until
22 that magic language is in there.

23 HONORABLE SCOTT A. BRISTER: That's a
24 separate issue.

25 MR. JEFFERSON: Yes. But I'm trying to

1 grasp all the different --

2 MR. ORSINGER: I don't think you can go
3 back in and write that sentence in. You're going
4 to have to have a new judgment. You've got to have
5 a new judgment. Otherwise you're writing a
6 sentence in something that's been dated six months
7 before.

8 MR. JEFFERSON: Yes. What I'm saying is
9 that everybody is going to think that
10 everything -- you could have a grand jury trial
11 and, I mean, everything done with a final judgment
12 that says "Final" at the top and says "Here is how
13 everything is going to take place," and the writ
14 will issue in 31 days if not appealed or something
15 like that, and still nothing can be done until you
16 get a new judgment that says "Now this is a final
17 and appealable judgment." And so none of the
18 deadlines that are currently in place for final
19 motion for new trial would apply until then.

20 It would just be -- I think it would be
21 radical, and we'd have to change all the other
22 Rules. I'm not necessarily saying it shouldn't
23 happen; but I think we ought to think long and hard
24 about how to proceed.

25 CHAIRMAN BABCOCK: Judge Lawrence.

1 HONORABLE TOM LAWRENCE: Is it our intent
2 now that if they don't have this specific language,
3 there is a missing, a couple of words missing, they
4 say "Appealable Judgment" and leave out "or Order,"
5 because it is a judgment, not an order, that it is
6 therefore not an appealable final judgment? Is
7 that what we're saying?

8 MR. YELENOSKY: That's what I think
9 everybody voted on. I didn't vote on that.
10 Everybody laughed when I said it. I mean, magic
11 doesn't work unless it's exact. Then you're back
12 into the whole problem again of not being sure
13 whether you have a final judgment or not; and the
14 majority voted for a very radical position that you
15 had to have neon magic language, and it has to be
16 there, and the chance that it will be in the wrong
17 place is likely. A word will be left out.

18 HONORABLE SCOTT A. BRISTER: But what is
19 the harm --

20 MR. YELENOSKY: I'm not arguing against
21 it.

22 HONORABLE SCOTT A. BRISTER: -- making
23 that mistake?

24 MR. YELENOSKY: I'm just saying --

25 HONORABLE SCOTT A. BRISTER: The harm of

1 making that mistake is so slight. The harm of
2 missing your appeal is drastic.

3 MR. YELENOSKY: I'm not arguing against
4 it. I'm just saying that we've already crossed
5 that bridge when we said we wanted magic language.
6 That's the essence of magic language.

7 MR. ORSINGER: That's not the harm. The
8 harm is that the word is missing, and nobody
9 notices it. And in three years some clever lawyer
10 notices it and says "This is not a final judgment.
11 Let's go have a motion for new trial," or "You
12 can't enforce this because it's not final. They
13 missed the words 'or order.'"

14 CHAIRMAN BABCOCK: Richard, that is
15 probably going to happen. But the question is
16 whether or not that harm, which is hopefully not
17 going to happen very often, is greater than the
18 harm we're trying to cure.

19 MR. ORSIGNER: That's right. It's a
20 policy decision.

21 PROFESSOR DORSANEO: I would recommend to
22 the Committee they try to deal with some sort of
23 substantial compliance approach. You can say, you
24 know, what you need to say, you know, without
25 saying it has to be exactly in this language and

1 that this language will work. We've done that in a
2 lot of other circumstances. The statutes do that
3 all the time. This will take a little tiny bit
4 more work; but if somebody left out the word, you
5 know, "Final," this is appealable judgment, or left
6 out, you know, or left out a comma, that
7 shouldn't. I mean, let the people in Florida look
8 stupid. We don't have to look stupid too.

9 CHAIRMAN BABCOCK: Well, to me stupid is
10 not being able to read a sentence and copy it.

11 HONORABLE SARAH B. DUNCAN: If we could
12 just have a sense of the Committee again that we
13 want language something like this, then we can go
14 back and work out a Rule; and it may have a
15 sentence with brackets around it that says
16 "Substantial compliance will suffice," and we can
17 vote that up or down.

18 CHAIRMAN BABCOCK: Here is an idea,
19 Sarah. We have three things here. We've got the
20 actual language that we've been talking about,
21 "This is a final appealable judgment or order,"
22 et cetera. That's one issue. We've got the title
23 of the document must be labeled "Final Judgment";
24 and then we've got placement of the language.
25 Let's take three votes. Let's vote on the

1 language, and then let's vote on these other
2 things. Okay?

3 HONORABLE SARAH B. DUNCAN: Okay.

4 CHAIRMAN BABCOCK: All right. Everybody
5 who is in favor of the following language --

6 MR. HAMILTON: Can I ask a question
7 first?

8 CHAIRMAN BABCOCK: Yes.

9 MR. HAMILTON: Are we still considering
10 the last paragraph and the first two paragraphs?

11 CHAIRMAN BABCOCK: Not right now.

12 MR. HAMILTON: No. But ultimately as
13 part of this?

14 CHAIRMAN BABCOCK: Ultimately I think
15 we're going to talk about it, yes.

16 MR. HAMILTON: Or something like that.

17 CHAIRMAN BABCOCK: Or something like
18 that. Okay. But now we're going to vote on this
19 language.

20 HONORABLE SARAH B. DUNCAN: Can I?

21 CHAIRMAN BABCOCK: Yes.

22 HONORABLE SARAH B. DUNCAN: Vote on this
23 language, except that, and I think Justice Hecht is
24 absolutely correct, this language won't do it in a
25 probate case.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE SARAH B. DUNCAN: Because you
3 can intend to render a final judgment or order and
4 not deny all relief not expressly granted either in
5 this judgment or prior orders, so we're going to
6 have to play with that a little bit.

7 CHAIRMAN BABCOCK: Yes. Subject to the
8 areas like probate, guardianship, interpleader,
9 receivership, et cetera.

10 HONORABLE SARAH B. DUNCAN: Right.

11 CHAIRMAN BABCOCK: But as a general rule
12 here is the language. Everybody now that is in
13 favor of the following language raise their hand:
14 "This is a final appealable judgment or order. All
15 relief requested in this case that is not expressly
16 granted in this judgment or by prior written order
17 is denied." Everybody in favor of that language
18 raise your hand.

19 MR. WATSON: Does this mean we are
20 radical?

21 CHAIRMAN BABCOCK: Everybody opposed? It
22 passed 21 to 4. The next vote.

23 MR. EDWARDS: I had one thing. I didn't
24 bring it up before. There was one word about that
25 language. Doesn't it have to be a subsisting

1 order, one that has not been superceded by a
2 subsequent written order or not superceded by the
3 judgment? Any? I can make the argument that I'm
4 entitled to the judgment on some order that has
5 been overruled somewhere.

6 CHAIRMAN BABCOCK: Yes. Okay. I think
7 that's Sarah.

8 HONORABLE SARAH B. DUNCAN: Right.

9 CHAIRMAN BABCOCK: Will you note that
10 when you draft that?

11 HONORABLE SARAH B. DUNCAN: I will have
12 the minutes when drafting it.

13 CHAIRMAN BABCOCK: All right. Now the
14 issue is title. How many think that this piece of
15 paper should be titled, must be titled, quote,
16 "Final Judgment"? Everybody who believes that
17 except Buddy.

18 MR. LOW: No. Doesn't a decree of
19 divorce have to be entitled by statute?

20 MR. ORSINGER: We're not going to treat
21 family law separately. Family Code requires that
22 they be decrees.

23 MR. LOW: Put in there "Must be titled
24 Final Judgment or Decree of Divorce." You're
25 probably not going to put Decree of Divorce in a

1 personal injury case.

2 CHAIRMAN BABCOCK: Right.

3 MR. LOW: People will know which kind of
4 case it is.

5 CHAIRMAN BABCOCK: Buddy, on this one as
6 with the one, if there are special requirements
7 that currently exist like for probate or
8 guardianship or any of these other things or
9 decrees of divorce.

10 MR. LOW: Okay. I'm told that a decree
11 of divorce has to be captioned that way.

12 CHAIRMAN BABCOCK: Whatever it is.

13 MR. LOW: Okay. Being a really skilled
14 divorce lawyer, I wanted to call that to your
15 attention.

16 HONORABLE SARAH B. DUNCAN: And you might
17 have, for instance, if you have an appealable
18 interlocutory order like a denial of motion for
19 summary judgment that is made appealable by
20 statute, --

21 MR. LOW: Oh.

22 HONORABLE SARAH B. DUNCAN: -- you're not
23 going to label that "Final Judgment," because it's
24 not a final judgment.

25 CHAIRMAN BABCOCK: Right. Okay.

1 HONORABLE SARAH B. DUNCAN: But we'll
2 have to play with that.

3 CHAIRMAN BABCOCK: Judge Lawrence.

4 HONORABLE TOM LAWRENCE: Are we going to
5 say "Final Judgment" in the caption and "Final
6 Judgment or Order" in the text?

7 CHAIRMAN BABCOCK: Yes. That's a good
8 point. There's an inconsistency there.

9 HONORABLE SARAH B. DUNCAN: We'll play
10 with that.

11 CHAIRMAN BABCOCK: That is a detail
12 according to Justice Duncan that will be worked
13 out. But the general concept of where appropriate
14 should it be mandatory that the piece of paper be
15 labeled "Final Judgment," should there be a
16 labeling requirement. Judge Brown.

17 HONORABLE HARVEY G. BROWN: Just a
18 suggestion. Why couldn't we use the word "should"
19 here rather than "mandatory"? In other words, try
20 to get the Bar to make it easier; but not make it
21 100 percent mandatory.

22 CHAIRMAN BABCOCK: Let's vote first on
23 "mandatory"; and then we'll vote on. Steve.

24 MR. TIPPS: I was reading the second,
25 what Harvey said. It seems to me that the more

1 requirements we impose, the more complicated we
2 make this. And it's one thing to say "There are
3 magic words. Put the magic words in the
4 document." I think beyond that we ought not to
5 require a particular title or even a particular
6 placement. I think it might be a good idea to
7 suggest that; but I would be opposed to making that
8 mandatory.

9 CHAIRMAN BABCOCK: I think that's a good
10 point.

11 MR. WATSON: Why don't you flip them.
12 "Should" first and then --

13 CHAIRMAN BABCOCK: Go ahead and do
14 "should" before "must." Okay. We're going to
15 vote on "should" --

16 HONORABLE SCOTT A. BRISTER: If this
17 sentence goes first as the first in order, I think
18 that's probably okay. If it's somewhere else in
19 the order, at the end, then we're right back at the
20 bridge where we start. You have got an order which
21 in case you don't find that paragraph, there is
22 nothing to hint that your appellate period just
23 started. That's why I like XXX or something else
24 that, you know, "Vote here" with an arrow,
25 something.

1 CHAIRMAN BABCOCK: We're going to talk
2 about --

3 HONORABLE SCOTT A. BRISTER: This is it.
4 No excuses, no ifs, ands, or no "I was confused."
5 It needs to be --

6 MR. YELENOSKY: How about "Final
7 Judgment" --

8 HONORABLE SCOTT A. BRISTER: -- "I don't
9 believe you when you say you didn't realize that.
10 You're lying to me."

11 CHAIRMAN BABCOCK: Okay. We're going to
12 vote first on the label, and it will be "should,"
13 not "must." Okay. Is that everybody? Vote on
14 that? All right. "A final judgment should be
15 labeled 'Final Judgment' directly below the
16 caption." That's what we're voting on. Everybody
17 in favor of that raise your hand. Do I see your
18 hand up, Bill?

19 MR. EDWARDS: No.

20 CHAIRMAN BABCOCK: Mike?

21 MR. HATCHELL: (Nods negatively.)

22 CHAIRMAN BABCOCK: Everybody opposed?

23 HONORABLE TOM LAWRENCE: "Opposed" means
24 it should be "must"?

25 CHAIRMAN BABCOCK: No. We'll vote on

1 that in a minute.

2 HONORABLE SARAH B. DUNCAN: Can we hear
3 from the opposed?

4 CHAIRMAN BABCOCK: There's seven
5 against. And what do you want to hear from them?

6 HONORABLE SARAH B. DUNCAN: I would like
7 to hear from the opposed as to why they're opposing
8 it.

9 CHAIRMAN BABCOCK: Okay. The people that
10 were opposed, why are you opposed?

11 MR. EDWARDS: I think it should say
12 "must."

13 HONORABLE TOM LAWRENCE: I think it ought
14 to be "must."

15 CHAIRMAN BABCOCK: Okay. You guys are
16 "must" people.

17 HONORABLE SARAH B. DUNCAN: Are all you
18 guys "must" people?

19 MR. HATCHELL: Yes.

20 PROFESSOR ALBRIGHT: I believe in
21 simplicity.

22 PROFESSOR CARLSON: A procedural
23 minimalist.

24 MR. YELENOSKY: I think it should be
25 "must" or nothing. It's going to be confusing to

1 practitioners if one provision is a "should" and
2 one is a "must." "What do I do?"

3 HONORABLE SARAH B. DUNCAN: Can we vote
4 on "must"?

5 CHAIRMAN BABCOCK: We'll vote on "must."
6 How many people think it should be "must"? How
7 many people think it should not be "must"?

8 MR. GILSTRAP: That means "should."

9 CHAIRMAN BABCOCK: All right. "Must"
10 fails by a vote of 10 to 14.

11 HONORABLE SARAH B. DUNCAN: So it's a
12 "should."

13 CHAIRMAN BABCOCK: So it's a "should."
14 Now on placement, how many people think that the
15 placement of the neon language should be directly
16 above the date and signature of the judge? That's
17 what we're going to vote on, "should," not "must."
18 How many people think that should be placed there?
19 Everybody raise your hand. How many people think
20 it -- are against that?

21 HONORABLE SCOTT A. BRISTER: I'm only
22 against it if it's places absolutely first.

23 MR. YELENOSKY: The problem is we're
24 going "must," "should" and placement.

25 CHAIRMAN BABCOCK: That's a good point.

1 MR. YELENOSKY: How many people want it
2 first, how many people want it last, and then get
3 the "should" and "must."

4 CHAIRMAN BABCOCK: Yes. Let's define it
5 this way: How many people think that the Rule
6 should include a placement feature? Anybody
7 against? Alex was against.

8 MS. BARON: I'm against too.

9 MR. ORSINGER: There are several over
10 here (indicating).

11 CHAIRMAN BABCOCK: All right. Let's
12 count it then. How many people think the Rule
13 should have a placement feature? And how many
14 people think it should not? 26 to 3. That
15 carries.

16 Okay. Now should we vote on whether it be
17 "must" or "should"?

18 HONORABLE SCOTT A. BRISTER: First or
19 last.

20 CHAIRMAN BABCOCK: First or last. How
21 many people think it should be first? And how many
22 people are against it being first?

23 MS. BARON: You mean how many want it to
24 be last?

25 MR. ORSINGER: No. It could be in the

1 middle or anywhere.

2 CHAIRMAN BABCOCK: It could be in the
3 middle or anywhere. The number of people that want
4 it to be first are 15 to 5.

5 Now how many people want it to be last? And
6 how many people are against it being last?

7 HONORABLE SCOTT A. BRISTER: The way
8 you've done it you're going to have it in two
9 places.

10 CHAIRMAN BABCOCK: Nine to seven, so I
11 think the sense is it ought to be first.

12 PROFESSOR ALBRIGHT: This needs to be a
13 disjunctive jury question.

14 CHAIRMAN BABCOCK: I think it is.

15 MR. ORSINGER: Can I propose that we put
16 it in a footer as well? Because that's where
17 everybody will read it, in a footer.

18 CHAIRMAN BABCOCK: You can propose that
19 if you're serious.

20 MR. ORSINGER: No. The footer is not
21 final.

22 CHAIRMAN BABCOCK: Look. Nothing is
23 final about what we're doing today.

24 MR. YELENOSKY: Thank God we're just
25 advisory.

1 CHAIRMAN BABCOCK: We're just telling
2 Sarah what to do. There is nothing final about
3 this. Okay. Sarah. Yes, Judge Lawrence.

4 HONORABLE TOM LAWRENCE: So we're going
5 to have a final judgment rule that is going to have
6 mandatory language at the first as outlined in
7 paragraph (3), I guess; and then we're going to
8 have discretionary language that says you may or
9 may not, may put in that it's a final judgment?

10 HONORABLE SARAH B. DUNCAN: "Should."

11 CHAIRMAN BABCOCK: "Should," I thought.

12 HONORABLE SARAH B. DUNCAN: Should title
13 it Final Judgment or Order, if that's appropriate.

14 HONORABLE TOM LAWRENCE: So if you don't
15 put it in the title, but you put the language in
16 the text, you're okay. It's still a final
17 judgment?

18 PROFESSOR ALBRIGHT: If it's in the right
19 place.

20 CHAIRMAN BABCOCK: We didn't vote on that
21 yet. Yes. We haven't voted on that. Or did we
22 vote on that?

23 MR. TIPPS: We have not voted on "should"
24 or "must" in placement.

25 CHAIRMAN BABCOCK: Okay. The placement

1 issue. Mandatory by "must," or discretionary by
2 "should," which do you want to vote on first?

3 HONORABLE SARAH B. DUNCAN: Mandatory.

4 CHAIRMAN BABCOCK: Do you want to vote on
5 the mandatory? How many people think that it
6 should be mandatory, in other words, the placement,
7 the language should be "must be placed"? How many
8 people are in favor of that? How many people are
9 against it being mandatory? By 18 to 9 the vote is
10 that it should be mandatory. All right.

11 MR. GILSTRAP: "Must be mandatory."

12 CHAIRMAN BABCOCK: "Must." "Must" be
13 mandatory, "shall" be mandatory. All right, Sarah,
14 what else do you want to know from us?

15 HONORABLE SARAH B. DUNCAN: The one other
16 thing I think is the 1996 proposal, Rule 300(b)(3),
17 do we want to do -- do you want us to do anything
18 about the cumulative order document? Bill's
19 proposal was that we build this into the Rule 300
20 that the SCAC proposed in 1996, which I think is a
21 great idea.

22 PROFESSOR DORSANEO: I think you need to
23 build it into (b)(1), (b)(2) or (b)(1).

24 HONORABLE SARAH B. DUNCAN: Is that the
25 sense of the Committee?

1 CHAIRMAN BABCOCK: Let's be clear about
2 it. In other words, when the cumulative orders of
3 the Court disposes of all claims against all
4 parties then it's final?

5 HONORABLE SARAH B. DUNCAN: Only -- what
6 this does is reverse, overrule your current law.
7 The current law is it's a final judgment if the
8 last order signed disposes of the last party or
9 claim.

10 HONORABLE SCOTT A. BRISTER: Whether
11 anybody realizes it or not.

12 HONORABLE SARAH B. DUNCAN: Whether
13 anybody realizes it or not. What proposed Rule
14 300(b)(3) does is overrule that, that line of
15 cases, and says if you have got a series of orders
16 disposing of some parties and some claims and the
17 last one disposes of the last party or the last
18 claim, you must still get one document that
19 expressly deals with all the parties and claims in
20 the case even if it's just by incorporating a prior
21 order or judgment.

22 CHAIRMAN BABCOCK: How does everybody
23 feel about that? Frank.

24 MR. GILSTRAP: Haven't we said that there
25 is no cumulative order rule anymore? You have got

1 to have magic language. It doesn't make any
2 difference what the cumulative orders do. Isn't
3 that what we voted on?

4 HONORABLE SARAH B. DUNCAN: It's going to
5 make a difference as to whether your magic language
6 is appropriately used in the order or judgment.

7 MR. GILSTRAP: If it's used, that's it.

8 CHAIRMAN BABCOCK: And if it's not used,
9 it's not it.

10 PROFESSOR CARLSON: On an order of
11 severance you call it a final judgment and put in
12 this language.

13 MR. YELENOSKY: You don't have to call it
14 a final judgment, but you've got to have that first
15 sentence.

16 PROFESSOR ALBRIGHT: If it follows all
17 these magic rules, then it's a final appealable
18 judgment and you've got to take it to the Court of
19 Appeals to get it reversed because it was an error
20 that they called it a final judgment, or you have
21 30 days to get the trial judge to fix it.

22 HONORABLE SCOTT A. BRISTER: Right.
23 "Rehear it, Judge. You made a mistake" is what
24 most people I assume will do.

25 PROFESSOR ALBRIGHT: It doesn't matter

1 what order it's in. If the magic language is
2 there, the magic language is there. I agree with
3 Frank.

4 MR. GILSTRAP: You disposed of all
5 claims. It's express language.

6 PROFESSOR ALBRIGHT: Whether it's really
7 been disposed of or not.

8 PROFESSOR DORSANEO: The only one, as
9 Elaine says, that is a tricky one is the severance
10 order; and I would hope that the severance order
11 would not say that it's a final judgment --

12 PROFESSOR CARLSON: I would too.

13 PROFESSOR DORSANEO: -- and have this
14 language in it. If it did, then you'd have to be
15 smart enough to figure out that that prior order
16 that wasn't contradicted needs to be appealed now.

17 HONORABLE SCOTT A. BRISTER: I don't
18 understand. Wasn't the severance case one of the
19 worst cases for missing your appeal?

20 PROFESSOR DORSANEO: Uh-huh (yes).

21 HONORABLE SCOTT A. BRISTER: I mean,
22 that's one of the main situations where people miss
23 their appeal. Something got severed out. Final
24 judgments were entered months, years ago; but they
25 became final on a severance order that said nothing

1 about this is a final judgment.

2 The principle ought to be a severance order
3 even if everything is severed out is dead, stake
4 through the heart, is not final until it says the
5 magic language, because otherwise --

6 PROFESSOR DORSANEO: No. No. What I'm
7 saying is even if the severance order said the
8 magic language, that someone could say that the
9 severance putting that -- you're not supposed to
10 put that language in the severance order. You're
11 supposed to do more than that. You're supposed to
12 say this order severs and finalizes all the rest of
13 it, and that's why it's a final appealable order.

14 I think that may be a drafting technicality
15 that the Committee can deal with. Anything other
16 than a severance order if you say this is a final
17 judgment and if you have the idea that prior
18 written orders are not superceded unless it says
19 so, then all that works fine.

20 HONORABLE SCOTT A. BRISTER: Why can't it
21 be Severance Order and Final Judgment?

22 PROFESSOR DORSANEO: It could be. And
23 then that would work fine.

24 CHAIRMAN BABCOCK: Yes. It could be
25 that.

1 PROFESSOR CARLSON: That was my
2 question. Do you need something called a Final
3 Judgment? I like including this 300(b).

4 CHAIRMAN BABCOCK: Yes, Judge Lawrence.

5 HONORABLE TOM LAWRENCE: I hate to keep
6 raising this, and I know we voted on it; but if the
7 idea is that you be able to look at the document
8 and it's clear to everybody that this is a final
9 appealable judgment, but we have set up a situation
10 where the magic language is in there, therefore
11 it's a final appealable judgment, but we may have a
12 different caption other than final judgment,
13 therefore that is a final appealable judgment; but
14 if it says Final Judgment in the caption and
15 doesn't have all the language exactly in the text,
16 then it's not a final judgment. To me that's going
17 to set up some confusion. I think it would be
18 better, and I know we voted on it, but it would
19 make more sense to have that --

20 HONORABLE SCOTT A. BRISTER: We passed
21 that it should say Final Judgment and must say the
22 first sentence.

23 HONORABLE TOM LAWRENCE: I think that's
24 going to be confusing.

25 MR. YELENOSKY: We said that and you-all

1 voted us down.

2 MR. LAWRENCE: No. I voted "no."

3 MR. YELENOSKY: Oh, you voted "no."

4 MR. LAWRENCE: It must have it in that.

5 MR. GILSTRAP: The problem is the more
6 you add to it, the more you have problems with the
7 people that don't comply with every part to it. If
8 you continue to load up with requirements, you're
9 going to have people who drop some of it. It gets
10 back to the substantial compliance rule. Maybe
11 that's how we solve it. And that's the dilemma
12 we're on, Tom.

13 CHAIRMAN BABCOCK: We've been talking
14 about (b)(3). And does anybody else have a sense
15 of whether the concept of that (b)(3) should be
16 included?

17 PROFESSOR DORSANEO: The last time around
18 the big discussion was whether if you have the
19 general language, you need to say that prior
20 specific language is not expressly eliminated by
21 the general language. And I don't remember whether
22 it was Judge Guittard or Rusty McMains or whoever;
23 but the Committee voted two times that if the
24 general language is going to use to finalize
25 matters, if it's going to be Mafrige/Mother Hubbard

1 language, then we need to have an exception like
2 the one that's in 300(b)(3) and in some of the
3 Committee's drafts, that the general language does
4 not trump the provisions of an earlier signed order
5 granting relief. And the idea there is a simple
6 one, that if the judge wants to trump the earlier
7 order, it has to be trumped in a clearer way.

8 HONORABLE SCOTT A. BRISTER: So if you
9 have sanctioned somebody for \$500, sign an order,
10 and the final judgment doesn't mention anything
11 about sanction, it stands unless the person who is
12 supposed to pay the \$500 asks the judge to put the
13 language in wiping it out?

14 PROFESSOR DORSANEO: Right.

15 CHAIRMAN BABCOCK: And somebody raised
16 that earlier about this language; and Sarah noted
17 that and was going to try to take care of it.

18 HONORABLE SCOTT A. BRISTER: That's
19 fine.

20 CHAIRMAN BABCOCK: So I think what we're
21 saying is conceptually we're going to try to work
22 with that and get it into the language. Right?

23 HONORABLE SARAH B. DUNCAN: Uh-huh (yes).

24 CHAIRMAN BABCOCK: Is that a "yes"?

25 HONORABLE SARAH B. DUNCAN: Yes.

1 CHAIRMAN BABCOCK: You have to answer
2 outloud. Steve.

3 MR. TIPPS: I'm obviously missing
4 something. Why doesn't the magic language that we
5 have adopted that specifically says "relief
6 requested that is not expressly granted in this
7 judgment or by prior written order is denied," why
8 does that not preserve what has been done earlier?

9 CHAIRMAN BABCOCK: It probably does; but
10 Bill raised an issue of what if a prior written
11 order has -- it has got to be still standing. Like
12 the judge hasn't later modified it or reversed
13 himself or something like that.

14 MR. TIPPS: Okay.

15 JUSTICE NATHAN HECHT: I don't want to
16 subvert the process here; but I'm trying to think
17 of questions my colleagues might raise. And one is
18 what are the merits or demerits of putting this
19 statement or something like it in just a separate
20 sheet of paper that is signed by the judge, it's by
21 itself, after whatever order or judgment or decree
22 is entered in the case that just says this case is
23 concluded and the appellate deadline will begin
24 today?

25 HONORABLE SCOTT A. BRISTER: In effect I

1 sign off and this file is now closed.

2 HONORABLE SARAH B. DUNCAN: I think last
3 time we called it a closed case memorandum; but it
4 wouldn't be that extensive.

5 JUSTICE NATHAN HECHT: What I was trying
6 to think through, and I just don't know the answer
7 to it is, would there be any incentive to delay
8 that entry of that piece of paper in the file after
9 a real final judgment was signed? I can't think of
10 one.

11 MR. ORSINGER: You can't post a
12 supersedeas bond until final notice of appeal. You
13 can't file your notice of appeal until the second
14 memorandum has been signed. But if the judgment
15 has been signed and the memorandum has not been
16 signed, wouldn't the judgment be enforceable?

17 JUSTICE NATHAN HECHT: I would say "no."
18 Times don't run. The judgment is not enforceable.
19 You can't issue an execution. Nothing can happen
20 until you put this piece of paper in the file.

21 HONORABLE SCOTT A. BRISTER: What is
22 added by having a separate "This file is now
23 closed"?

24 JUSTICE NATHAN HECHT: You don't have to
25 worry about where it is in the order. You don't

1 have to worry about whether it's in the middle of
2 the paragraph or at the bottom.

3 HONORABLE SARAH B. DUNCAN: Would you
4 like to join our subcommittee?

5 JUSTICE NATHAN HECHT: It is just there
6 and they'd know. The clerk can find it. There is
7 nothing in it that -- you put in the Rule that you
8 can't put anything else in the Rule except for
9 that. You might even reference the Rule so that
10 pursuant to Rule 300 point whatever so that even if
11 it weren't identical to this language, it would be
12 clear that that was the intention.

13 HONORABLE SCOTT A. BRISTER: Well, just I
14 sign 800 orders a year getting rid of cases. Now I
15 sign 1600, do two for a file.

16 MR. EDWARDS: The problem I have with it
17 is you can't tell from looking at the judgment
18 itself whether it's necessarily final if you've got
19 to go to some other piece of paper.

20 HONORABLE SARAH B. DUNCAN: You will know
21 that it won't be.

22 MR. EDWARDS: No. It might be.

23 HONORABLE SCOTT A. BRISTER: In the
24 county records we have to file a final judgment
25 saying the case closed.

1 MR. EDWARDS: It might be because there's
2 a case closed out there. What I'm saying is you
3 can't tell just from looking at the judgment. The
4 judgment may be filed because this other paper has
5 been filed; but you can't tell from looking at the
6 judgment itself.

7 HONORABLE SARAH B. DUNCAN: That's
8 right.

9 MR. EDWARDS: That's my problem.

10 MR. LOW: It would also be those orders
11 would kind of become pretty standardized probably
12 and be more, you know, chance of mistake plus the
13 fact that the lawyer, the lawyers, they have a
14 simple lawsuit, two-party, they're going to prepare
15 a judgment. The Plaintiff gives him money. The
16 Defendant prepares it. Or say they don't know it's
17 final. They don't know to present it, and then
18 it's open unless that's there. I think if you do
19 it all in one document, it would be neater.

20 CHAIRMAN BABCOCK: All right. Elaine.

21 PROFESSOR DORSANEO: If you just do this
22 and somebody signs it by mistake and the time runs,
23 that is just too bad. Right?

24 JUSTICE NATHAN HECHT: Well, I'd say
25 notice. The clerk would have to give notice, have

1 to tie it to notice.

2 PROFESSOR DORSANEO: You can't really
3 tell by looking at it unless you're paying
4 attention for sure.

5 JUSTICE NATHAN HECHT: Well, yes.

6 CHAIRMAN BABCOCK: It looks like a form
7 notice.

8 MR. GILSTRAP: It says "This is a final
9 appealable judgment." That tips you off.

10 JUSTICE NATHAN HECHT: "This case has
11 been closed, and time for appeal began to run on
12 such and such date. Sincerely, the Clerk."

13 CHAIRMAN BABCOCK: Elaine.

14 MR. DORSANEO: A pretty explosive item --

15 CHAIRMAN BABCOCK: Is your name Elaine?

16 MR. DORSANEO: -- that's going to explode
17 if you didn't notice it was ticking.

18 CHAIRMAN BABCOCK: You're an Elaine
19 wannabe.

20 MR. YELENOSKY: If it solves the problem
21 of worrying about every -- if it's a form that is
22 essentially fill in the blank for the Clerk, then
23 it will always have the magic language in it.

24 CHAIRMAN BABCOCK: The Chair recognizes
25 Professor Carlson.

1 PROFESSOR CARLSON: Thank you. I like
2 the idea myself. There may be practical
3 implications; but it sure seems from a notice point
4 of view if you called it something unique like
5 Certificate of Closed Case and you get the postcard
6 notice from the Clerk that says that, that's surely
7 a lot better than something that says Final
8 Judgment that may not have the magic language or
9 has sort of the magic language, but not exactly.

10 I think it's a very intriguing idea, and would
11 allow us not to maybe tamper too much with the
12 intricacies of the jurisprudence we have on final
13 judgment. I like that approach very much.

14 CHAIRMAN BABCOCK: Well, not to be a
15 negative; but we did start out the discussion of
16 this Rule talking about Rule 58 of the Federal
17 Rules and all the trouble that the Federal system
18 has had with that very concept of requiring a piece
19 of paper that says "Final Judgment," and we
20 probably should still keep that in mind before we
21 rush to.

22 PROFESSOR CARLSON: Haven't we done that
23 with these other proposals?

24 CHAIRMAN BABCOCK: Maybe.

25 MR. GILSTRAP: Rule 58 is a separate

1 document. That's why it's different.

2 CHAIRMAN BABCOCK: Right. That's what
3 we're talking about.

4 MR. GILSTRAP: That's what we're talking
5 about. That's what is different than what we've
6 done.

7 CHAIRMAN BABCOCK: Yes, Judge Brown.

8 HONORABLE HARVEY G. BROWN: If they're
9 not signed at the same time, it is a bit of an
10 administrative problem for the Clerk. If this
11 comes in and it looks the same as every other case,
12 the Clerk will have to go get the final judgment,
13 and she has to figure out if the final judgment is
14 really a final judgment to give this to the judge,
15 or else the judge has got to go back and reread
16 the, quote, "Final Judgment" which is not really
17 necessarily final.

18 If I sign them at the same time, why not have
19 one document? If you're going to sign them at
20 different times, you are going to have to go back
21 and look at the order all over again.

22 CHAIRMAN BABCOCK: Yes. What happened in
23 the Federal system is it requires a separate
24 document. The Federal judges have not been doing
25 that, and they've been telling the clerks to close

1 the file; and the clerks who are not independently
2 elected in the Federal system, but rather work for
3 the judges are doing it, and then five years later
4 somebody pops up and says "Wait a minute. There's
5 no final judgment here."

6 PROFESSOR CARLSON: If you have one
7 discrete piece of paper you know has to be signed
8 in your case, how bright of a line do you have to
9 get?

10 JUSTICE NATHAN HECHT: And it doesn't
11 have to be signed. It could be signed by the
12 clerk.

13 PROFESSOR DORSANEO: But does it do
14 the --

15 HONORABLE SCOTT A. BRISTER: Rubber
16 stamps. No question about it.

17 PROFESSOR DORSANEO: Does it do the job of
18 actually getting everything finished and if no
19 other piece of paper is even ever signed?

20 JUSTICE NATHAN HECHT: Well, it may or
21 may not. But if it doesn't and it's error, the
22 Court of Appeals is going to send it back. If it
23 doesn't because they're may be some piece missing
24 that the trial judge or parties overlooked, they're
25 going to hold the appeal while the trial judge puts

1 it in the file.

2 PROFESSOR DORSANEO: But somebody has to
3 know, has to realize this thing that looks fine is
4 not fine while the appeal time is running. And the
5 problem I have with it is that when you look at it
6 it doesn't look like there is anything wrong with
7 it.

8 HONORABLE HARVEY G. BROWN: It could be
9 signed easily.

10 PROFESSOR DORSANEO: Yes. When there's
11 quite a lot wrong with it if it wasn't meant to be
12 signed.

13 MS. CORTELL: That's true with the other
14 proposal.

15 PROFESSOR DORSANEO: Well, no. I mean,
16 it doesn't look right. You know, it's got more to
17 it. It gives you more of a clue that there's
18 something wrong.

19 HONORABLE SCOTT A. BRISTER: Again, on
20 abstracting judgments, does that have to go in
21 too? Because I can get a signed judgment; but it's
22 not final until this other thing, and filing it
23 with the County Clerk is different from the
24 District Clerk.

25 JUSTICE NATHAN HECHT: I tell you what

1 triggered it in my mind. I've been struggling to
2 understand Richard's decoupling idea all day. And
3 I am still not sure I understand it. But if there
4 is validity to it, it seems to me the validity is
5 in trying to fix a time where all of the post
6 judgment things start to happen, motions for new
7 trial, motions to modify, execution, turnover
8 orders, appeals, everything; and we all we need to
9 do is to be sure we know when that date is without
10 question. And we're saying we really want to do
11 that; but this language will do it; but then what
12 if it's in this paragraph, this paragraph, doesn't
13 have the caption. And this just --

14 HONORABLE SARAH B. DUNCAN: What are you
15 going to do about the orders that are appealable
16 without the case being closed, and what are you
17 going to do about the notice problem with Mother
18 Hubbard clauses in whatever it is?

19 JUSTICE NATHAN HECHT: Well, I would say
20 that this Rule only applies to cases in which one
21 final judgment can be rendered; and that would, it
22 seems to me, exempt out the probate cases, the
23 receiverships, and stuff like that, because as I
24 understand it some probate cases, particularly
25 pending administration, may never be closed. They

1 just stay open forever.

2 HONORABLE SARAH B. DUNCAN: But then how
3 can you --

4 JUSTICE NATHAN HECHT: Maybe that is too
5 simplistic.

6 HONORABLE SARAH B. DUNCAN: How can you
7 help the notice problem with all those orders that
8 are appealable even without the case being closed?

9 JUSTICE NATHAN HECHT: Well, if they're
10 appealable because they are interlocutory, we have
11 not talked about that. I wouldn't worry about
12 that. If they're appealable only because multiple
13 final judgments can be rendered in the case, I'd
14 exempt those cases out. I don't see any other way
15 to do it, because you can't -- it doesn't seem to
16 me, as hard as Crosson has been to apply, I don't
17 think a Rule could make it any easier.

18 MR. LOW: Is it the fact that the real
19 main judgment is entered, would it not say "Final
20 Judgment," or are you really?

21 JUSTICE NATHAN HECHT: It might.

22 MR. LOW: What I'm saying is it -- are
23 you talking about this in addition to what we
24 voted? Because then if somebody sees that and they
25 say "My God, it tells me up here the Final

1 Judgment. It tells me Final Judgment." Don't
2 worry. That isn't what it is?

3 JUSTICE NATHAN HECHT: No. All I'm
4 saying is that in addition to that before your
5 appellate time starts running you could call it
6 Final Judgment. You could say Plaintiff take
7 nothing, or you can say judgment is rendered by the
8 Plaintiff against the Defendant for this and costs
9 and that execution issue, and it looks to all the
10 world final, but the deadlines still don't start
11 running until you have this certificate.

12 MR. LOW: So this certificate would only
13 be for purposes of an appeal?

14 JUSTICE NATHAN HECHT: For purposes of the
15 deadlines and all post judgment motions.

16 HONORABLE SCOTT A. BRISTER: So you
17 couldn't abstract your judgment until the county
18 clerk checks and makes sure that that has been
19 filed?

20 JUSTICE NATHAN HECHT: Right.

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: It seems to me that now
23 the burden of determining when one appeals is on
24 the party, not the trial court, but on the party;
25 and it seems like we are shifting that

1 responsibility now to the judge by what he puts in
2 his order. And if we're going to shift that
3 responsibility to him, then why not just have him
4 in this same order that he's going to have to put
5 this neon language in say "Your time for appeal
6 commences today" or whatever it is, if that's going
7 to be his responsibility.

8 MR. YELENOSKY: It seems a little
9 parallel to me. When you start a lawsuit it says
10 you have been sued. You need to file an answer
11 within X number of days. If there is a separate
12 piece of paper maybe somewhat like that that says
13 "You may appeal," maybe it doesn't have to have
14 the Final Judgment language on it at all. It just
15 says "You may appeal."

16 CHAIRMAN BABCOCK: Judge Lawrence.

17 HONORABLE TOM LAWRENCE: I guess two
18 questions: What would be the effect if the final
19 judgment was signed, but this separate notice or
20 order was not signed? And would this trump any
21 defect in the final judgment? What if you had a
22 defect that nobody noticed? Would this cure that
23 defect?

24 JUSTICE NATHAN HECHT: Well, it would be
25 the same as this other clause. If it wasn't there,

1 your times wouldn't start running. If it is there,
2 your times start running no matter what. And if
3 there is a defect, it really should -- if there is
4 not a legal basis in the record for a judgment
5 disposing of all of the issues, then it's going to
6 get reversed. But if there is, then, it would be
7 affirmed.

8 MR. JEFFERSON: I think that separate
9 order makes sense, because I mean, there were
10 judgments in the past where, say, there was a
11 settlement with four defendants and not the fifth,
12 but the Mother Hubbard clause was put in. Well,
13 the judge never intended to dispose of the whole
14 case; and by signing a judgment that says "All
15 relief not granted to any party is hereby denied"
16 didn't intend to adjudicate the rights of the
17 person that hadn't settled before.

18 This proposal would at least give that
19 judge an opportunity to, you know, verify what his
20 intent is. If he intends for it to be appealable
21 and final, then he signs this judgment that makes
22 that very clear to all the parties and it goes out
23 to all the parties, and everyone knows what they
24 need to do to protect themselves from execution or
25 to get the appeal going or, you know, file the

1 motion for new trial or whatever else under
2 329(b). It's a pretty simple process.

3 CHAIRMAN BABCOCK: What we have voted on
4 so far, just to recap, is we voted that the judge
5 should put "Final Judgment" in the caption. We
6 said the judge must have the magic language in the
7 first paragraph; and that's obviously got to be on
8 a piece of paper. So haven't we already kind of
9 said that there's got to be a piece of paper? Yes,
10 Wallace.

11 MR. JEFFERSON: But there is something of
12 a fiction in that to me, because you might have a
13 judgment that has everything that makes it final,
14 and it disposes of all the parties; and we could go
15 back decades, and we know that that is, you know, a
16 final judgment, and yet this new Rule would be
17 saying "Well, it's not really a final judgment"
18 when it is, when it really does dispose of
19 everything and ought to begin the appellate
20 process.

21 CHAIRMAN BABCOCK: Yes. But my point is
22 I guess in the Federal system typically you get a
23 memorandum opinion at the district court level
24 granting your motion for summary judgment, and so
25 it goes through the whole thing, and it disposes of

1 every claim and every party. And it may even say
2 "This case is dismissed, signed the judge." We
3 know that's not a final judgment. Something else
4 has to happen. Well, that doesn't typically happen
5 in our system. I mean, some judges may write a
6 letter or opinion to you and tell you why they did
7 what they did; but that's more the exception than
8 the rule.

9 So my point is or my question is really by
10 doing what we've already done haven't we kind of
11 said there has got to be a piece of paper that has
12 got this magic language in it?

13 MR. JEFFERSON: But I think it's
14 simpler. I mean, and take the example of the last
15 order that disposes of the last person that a judge
16 or the parties may not even realize --

17 CHAIRMAN BABCOCK: Right.

18 MR. JEFFERSON: -- disposes of
19 everything. I just think it's simpler for the
20 party who is desiring to appeal from that judgment
21 to recommend to the judge or suggest, let him file
22 this separate piece of paper that no one -- you
23 know, that there is absolutely no confusion about
24 that this one-page form means that the parties have
25 appellate rights from this day forward.

1 CHAIRMAN BABCOCK: You would say that
2 would be to the exclusion of the judge on the last
3 party and the last claim putting in that piece of
4 paper "Final Judgment" with the magic language?

5 MR. JEFFERSON: No. Not to the
6 exclusion; but in the last party and the last claim
7 you would have to search through, unless we're
8 going to make these requirements, you know,
9 mandatory about where you put it in the document
10 and whether you call it the Final Judgment or Final
11 Order or what have you. You'd have to search
12 through that to make sure that that is a final
13 judgment, and it triggers your rights to appeal and
14 to execute. But with a separate paper that just
15 takes one signature and it's on one page there's no
16 confusion whatsoever.

17 CHAIRMAN BABCOCK: Let's take your
18 hypothetical. There's an order that adjudicates
19 the last party and the last claim and it's got the
20 magic language in it, but there's not a separate
21 piece of paper. Is that appealable? Is the
22 timetable running?

23 MR. JEFFERSON: I agree with Justice
24 Hecht, and I say "no," that you would still
25 need -- and the notice that goes out doesn't have

1 to be the judgment. The clerk can send this
2 one-page notice signed by the judge.

3 CHAIRMAN BABCOCK: But I get an order in
4 the mail in compliance with the Rule that says
5 "This is a final appealable judgment order. All
6 relief requested in this case that is not expressly
7 granted in this judgment or by prior written order
8 is denied." And but that doesn't start my
9 appellate timetable?

10 MR. JEFFERSON: The notice that you would
11 get, it would be that the Court has signed a
12 judgment disposing of everything that has been
13 signed. A case closing order has been signed; and
14 from this point forward your appellate deadlines
15 run. And there would be no confusion. The clerk
16 wouldn't have to read through the judgment to
17 figure out that that's the case.

18 CHAIRMAN BABCOCK: It sounds to me like
19 this is a discussion leading towards more magic
20 language or better magic language, different magic
21 language. I don't know. Frank.

22 MR. GILSTRAP: Chip, in your hypothetical
23 I surely think that the order you get from the
24 judge shouldn't say "This is a final appealable
25 judgment," because it's not. It's not until we

1 sign the separate document.

2 HONORABLE SARAH B. DUNCAN: As an
3 alternative to the language.

4 CHAIRMAN BABCOCK: Okay. Does anybody
5 else want to talk about the separate document
6 idea?

7 MR. LOW: It just tells you it's final;
8 but it's really not. I just have something,
9 because until you get that other piece of paper
10 it's just not. I mean, you know, you say it,
11 "Final Judgment," caption; but really I don't mean
12 that, because people don't look at something just
13 for purposes of appeal, or they look at it for
14 finality and things, and it draws a definite date
15 for appeal; but I think the other does too.

16 What happens if the judge mistakenly thinks
17 he, and I guess it wouldn't be the end of the
18 world, had signed what would really be the final
19 judgment, but some way the clerk had picked it up
20 and he hadn't signed it, and then he signs one
21 piece of paper. And you have got your
22 automatically invoked -- when you have got two
23 pieces of paper you have got double the chances of
24 mistake. And if he does that, I guess he would
25 start appealing, and then they'd look and see that

1 it hadn't been signed. I guess it wouldn't be, you
2 know, the end of the world; but it could happen.

3 CHAIRMAN BABCOCK: Mike Hatchell, what do
4 you think about the separate piece of paper?

5 MR. HATCHELL: Well, I'd like some
6 clarification. While it's superficially an
7 appealing concept because everybody kind of knows
8 when to go, it looks to me like the way our
9 appellate rules are set up now they're highly
10 integrated with the signature date on the judgment
11 not only as to when the appellate time frame
12 starts, but when your post judgment motions are
13 due, --

14 CHAIRMAN BABCOCK: Right.

15 MR. HATCHELL: -- and so and also when
16 the trial court's plenary power ends. And so if
17 we're going to uncouple those, that's fine. In
18 other words, you can have a final judgment and
19 you've got to go ahead and file your post judgment
20 motion, your motion for new trial, JOV motions, and
21 other motions under the 30-day rule.

22 So then you're going to have it looks to me
23 like a dual track. You're going to have to compute
24 those motions, and you're going to have to wait
25 until somebody puts this piece of paper in there

1 that says your appellate timetable starts so that
2 everything is not going to be running at the same
3 time.

4 And then I can envision one of these go ahead
5 and go things being entered at a time when the
6 appellate -- I mean when the plenary power of the
7 trial court expired. And the Court may say
8 "Well, no. I actually intended -- I didn't really
9 intend the final judgment here. I've got to clean
10 this up. Oh, but I can't do that."

11 Now so all I'm saying is we need to be careful
12 when we start getting tandem time things running
13 and it's not integrated like it presently is.

14 JUSTICE NATHAN HECHT: I think that's
15 awful. I mean, I don't think there should be a
16 tandem system. But if none of the times started
17 until this paper was signed, and you just ran them
18 all off this as if this were the real final
19 judgment.

20 MR. HATCHELL: Yes.

21 JUSTICE NATHAN HECHT: But it's just an
22 idea to get around the problem of whether it is or
23 belongs in an order that may or may not be intended
24 to be a final judgment.

25 MR. HATCHELL: My only point is that that

1 being true is just fine. It looks to me like it
2 renders pretty useless everything we've done up to
3 now.

4 CHAIRMAN BABCOCK: Why is that?

5 MR. HATCHELL: You don't need any of this
6 language about "This is a Final Judgment" what have
7 you. You just need the piece of paper.

8 CHAIRMAN BABCOCK: You just need the
9 piece of paper that says all these things.

10 HONORABLE SCOTT A. BRISTER: It seems to
11 me you have to decouple them, because NOV, new
12 trial, stuff like that you're attacking the
13 judgment. You're not attacking that extra sheet of
14 paper. Well, but that time to start attacking that
15 doesn't run until the extra sheet of paper which is
16 not related is signed doesn't make sense.

17 HONORABLE SARAH B. DUNCAN: That's
18 because you're thinking -- if could suggest to
19 you --

20 HONORABLE SCOTT A. BRISTER: I'm thinking
21 the judgment is final, which of course, silly, it
22 isn't.

23 HONORABLE SARAH B. DUNCAN: You're
24 thinking within the box. You're thinking within
25 the box.

1 CHAIRMAN BABCOCK: Oh, Judge Brister
2 wouldn't do that.

3 HONORABLE SARAH B. DUNCAN: What we were
4 suggesting doing is changing the box.

5 HONORABLE SCOTT A. BRISTER: Well, and
6 that's a separate reason. You know, remember what
7 happens every time we propose a new Rule. The
8 natural objection of all attorneys is "No. Don't
9 change the Rule." If we tried to change the new
10 Discovery Rules now, there would be huge objections
11 because we have now done it for a year.

12 HONORABLE SARAH B. DUNCAN: I think the
13 attorneys would like this change.

14 HONORABLE SCOTT A. BRISTER: To me to add
15 a new sheet of paper you're going to hear a bunch
16 of objections that are just unnecessary that you
17 won't hear if you just say "Put this sentence first
18 in the final judgment."

19 CHAIRMAN BABCOCK: This uncoupling thing,
20 I don't believe we voted on it. Have we?

21 MR. WATSON: We didn't.

22 CHAIRMAN BABCOCK: We've been talking
23 about it; but I don't know that we voted on it.
24 Did we?

25 HONORABLE SARAH B. DUNCAN: Who would

1 generate this document?

2 CHAIRMAN BABCOCK: What?

3 HONORABLE SARAH B. DUNCAN: Who would
4 generate this document?

5 HONORABLE SCOTT A. BRISTER: Xerox them.

6 JUSTICE NATHAN HECHT: Anybody could. If
7 a judge is DWOPing a case, he'd generate it.

8 HONORABLE SCOTT A. BRISTER: You'd have a
9 stack of them. The clerk would fill in the case
10 number.

11 JUSTICE NATHAN HECHT: And if it was a
12 party that was submitting the judgment, then they
13 would do it.

14 MR. EDWARDS: My observation is that if
15 I'm getting paid for generating this piece of paper
16 and getting it signed, I love it. If I'm paying
17 the bills for it, you can't explain to me why I
18 should have to pay for it.

19 CHAIRMAN BABCOCK: Should we talk about
20 this uncoupling thing a little bit?

21 MR. ORSINGER: No.

22 PROFESSOR DORSANEO: The uncoupling idea
23 does make some sense if you would say that we do
24 have dual timetables now. We have a separate
25 appellate timetable from the trial court

1 timetable. It could very easily say that a
2 separate piece of paper or whatever we would be
3 talking about would start, would be needed to start
4 the appellate timetable; but the trial court
5 timetable would start on some other basis.

6 MR. GILSTRAP: What is the trial court's
7 timetable that's different from the appellate court
8 timetable?

9 PROFESSOR DORSANEO: What?

10 MR. GILSTRAP: What is the trial court's
11 timetable that's different from the appellate
12 timetable?

13 PROFESSOR DORSANEO: The appellate
14 timetable is in Rule 26 of the Appellate Rules, and
15 the trial court timetable is Rule 329(b)] and
16 326(a).

17 MR. GILSTRAP: A motion for new trial
18 would be on track from the judgment, and then the
19 notice of appeal would be on track from the
20 separate document?

21 PROFESSOR DORSANEO: From the separate
22 piece of paper, yes. And presumably you'd never
23 have, you never would have had these Mother Hubbard
24 clause problems because the separate piece of paper
25 would never have been issued, okay, because nobody

1 thought that case was ready for appeal.

2 CHAIRMAN BABCOCK: Pam, what do you
3 think?

4 PROFESSOR DORSANEO: That is what I
5 thought you guys were talking about. I thought
6 Justice Hecht was talking about that too; but he
7 just said he wasn't.

8 JUSTICE NATHAN HECHT: Which now?

9 PROFESSOR DORSANEO: About a separate
10 piece of paper being for the appellate, an
11 appellate ticket only.

12 JUSTICE NATHAN HECHT: Well, it just
13 seems simpler. I hadn't thought it all through.
14 In fact, I was really interested in the comments of
15 the Committee; but it seems simpler to run all of
16 the deadlines of the court's plenary power off of
17 the separate piece of paper.

18 PROFESSOR DORSANEO: Then I don't see
19 any, myself then I don't see a reason for a
20 separate piece of paper if it's not going to do
21 anything different from what we've already talked
22 about.

23 JUSTICE NATHAN HECHT: Well, it's just
24 clearer. And the answer to Bill's question is so
25 that Plaintiffs don't lose their right of appeal

1 when somebody has moved for partial summary
2 judgment and has stuck one of these clauses in that
3 gets past somebody. And again, it seems to me if
4 you have a clause this plain in any kind of piece
5 of paper that you get, you're pretty well put on
6 notice; but I question whether it would be
7 clearer.

8 CHAIRMAN BABCOCK: You don't mean a
9 separate piece of paper in the sense in the Federal
10 Rule 58 separate piece of paper. You just mean
11 this language has got to be on a piece of paper?

12 JUSTICE NATHAN HECHT: No. I mean a
13 separate piece.

14 HONORABLE SARAH B. DUNCAN: Like a
15 certificate.

16 CHAIRMAN BABCOCK: So you do mean like
17 Rule 58?

18 JUSTICE NATHAN HECHT: Yes. Except that
19 Rule 58 requires the substance of the judgment to
20 be in the separate piece of paper. This would be
21 as somebody said, a Certificate of Closure or
22 something, just a separate document in the file
23 that says this is over, the time has run.

24 CHAIRMAN BABCOCK: You could call it
25 "That's all, folks."

1 JUSTICE NATHAN HECHT: "That's all
2 folks."

3 HONORABLE SARAH B. DUNCAN: And the
4 advantage of that to me, and I haven't thought it
5 all the way through by any stretch of the
6 imagination; but it seems to merge a lot of
7 advantages. We talked about various systems. Like
8 the question of the postcard notice, well, this is
9 a one-page document. Right? The clerks could
10 easily send this one-page document, I think, to
11 everybody, and they could see for themselves what
12 it says.

13 HONORABLE SCOTT A. BRISTER: That's a lot
14 of extra money. The reason we send postcards is
15 because we don't have to spend as much money on a
16 postcard as you do on a letter. If you send
17 200,000 of these a year, --

18 HONORABLE SARAH B. DUNCAN: But you can
19 send a postcard that says --

20 CHAIRMAN BABCOCK: "Final Judgment."

21 HONORABLE SARAH B. DUNCAN: -- "The trial
22 judge today signed a Certificate of Closure."

23 MR. TIPPS: "Your case is over."

24 HONORABLE SARAH B. DUNCAN: Right.
25 Because they're all going to look the same. There

1 are not going to be any varying provisions in
2 this.

3 JUSTICE NATHAN HECHT: As Stephen said,
4 you can even make it as formal as a citation. It
5 has to say exactly this and it has to look like
6 this.

7 HONORABLE SARAH B. DUNCAN: I like it.

8 PROFESSOR DORSANEO: Well, people have to
9 be pretty sensitized to the importance of a
10 postcard. I hope it doesn't get sent to a lot of
11 the people who check my mail. Postcards, I don't
12 care how much they cost. Postcards are a bad
13 idea. Okay. Postcards are a very bad idea.

14 HONORABLE SCOTT A. BRISTER: Tell my
15 county commissioner.

16 CHAIRMAN BABCOCK: Yes. That's another
17 county specific issue.

18 HONORABLE SCOTT A. BRISTER: Tell the
19 county commissioner.

20 MR. WATSON: So this, I mean, you're
21 talking about sort of like a death certificate. I
22 mean, we're putting it in the file.

23 CHAIRMAN BABCOCK: Death of a lawsuit.

24 MR. WATSON: And it's got to look like a
25 death certificate. It's signed like a death or

1 it's not a death certificate. You're not dead.

2 MR. HALL: But you can still execute and
3 everything else before --

4 HONORABLE SARAH B. DUNCAN: No.

5 MR. HALL: Okay. So everything is
6 interlocutory until the certificate.

7 CHAIRMAN BABCOCK: Until you get your
8 case closure death certificate.

9 MR. WATSON: We've recoupled finality for
10 purposes of execution --

11 CHAIRMAN BABCOCK: Right.

12 MR. WATSON: -- with the appellate
13 timetable.

14 CHAIRMAN BABCOCK: Right.

15 MR. GILSTRAP: Have we recoupled the
16 motion for new trial?

17 CHAIRMAN BABCOCK: Yes.

18 HONORABLE SARAH B. DUNCAN: Everything
19 would, all of the timetables.

20 MR. HALL: I think as long as it's all
21 integrated and there's just one deadline, it's
22 fine; but I share the same concerns as Mike of
23 having any kind of parallel timetables.

24 CHAIRMAN BABCOCK: Nina.

25 MS. CORTELL: I just have one concern

1 more like Buddy was saying, that if you add a new
2 procedure, new person responsible, a new gadget as
3 it were, it's a new opportunity for error and delay
4 really; and that's the concern I have with the
5 separate piece of paper. We have spent all this
6 time trying to make judgment explicit on its face,
7 and now we're saying that doesn't matter. Let's
8 wait for something else to happen.

9 JUSTICE NATHAN HECHT: But again, the
10 problem is not -- that has not been the problem so
11 that if the parties ignore the Rules changes and
12 don't read the Bar Journal and don't go to CLE and
13 they just go on about their merry way and they
14 think they've got a final judgment and they think
15 the plenary power has expired and they think
16 everything is done and they file an appeal, surely
17 most of the 80 appellate judges in the state will
18 have paid a little closer attention and they'll see
19 that there is no certificate in the file and under
20 Rule twenty-five or seven, whichever one it is -- I
21 need to find it -- they'll say there is no
22 certificate in here that allows for an appeal,
23 therefore it's premature. Does the -- do the
24 parties and the trial judge mean for that to be in
25 here or not? And they'll say whatever they say,

1 yes or no. And if the answer is yes, the trial
2 judge will stick it in there and then the Court of
3 Appeals will go ahead with the appeal.

4 The problem has been on the other side, at
5 least the problem in the cases that have come up,
6 where people were caught sleeping, that their
7 appellate time ran because they weren't
8 anticipating that the order was final, not that
9 they appealed too soon and then had to worry about
10 that. So I don't -- there shouldn't be any reason
11 for any delay other than a very modest delay while
12 the Court of Appeals says you're missing your
13 certificate and the judge sticks it in the file.

14 CHAIRMAN BABCOCK: Yes. Buddy.

15 MR. LOW: One of the criticisms of our
16 Rule changes, you know, we are supposed to create
17 less paper, you know, less work; and I hear people
18 tell me all the time that what we do is create more
19 paper and more work. I know it's just one page;
20 but we'll certainly hear that argument. I'm not
21 saying that's a reason not to do it; but it is
22 certainly something the lawyers think about.

23 CHAIRMAN BABCOCK: Yes. Bonnie. I'm
24 sorry.

25 MS. WOLBRUECK: I guess just to follow up

1 on what Buddy said, I guess that I'm sitting here
2 trying to think what objections the clerks would
3 have to it; and it's probably just the handling of
4 an additional piece of paper, archiving,
5 microfilming, imaging, whatever that clerk is doing
6 and the cost of that extra sheet of paper. But
7 considering the number of cases we have in the
8 State of Texas, maybe that is a very nominal cost.

9 I'm trying to think of the issues involved.
10 It could be, you know, we have a final judgment,
11 and the clerk has, the judge had signed that order
12 or that judgment, and we have placed the file on
13 the -- in the filing cabinet or something, and then
14 three days later we get this document that you have
15 to pull it and the judge has to see the file again
16 to see this document. I could just see a little
17 bit of extra staff time that would be involved in
18 it, although I still like the concept

19 CHAIRMAN BABCOCK: The point is too
20 that --

21 HONORABLE SARAH B. DUNCAN: Balance
22 against that the staff time you're going to gain --

23 MS. WOLBRUECK: Sure. Yes.

24 HONORABLE SARAH B. DUNCAN: -- by not
25 having to try to figure out what is a final

1 judgment and order.

2 MS. WOLBRUECK: I agree. I really don't
3 have any objections to it. I'm just trying to sit
4 here and think of any objections that may be
5 voiced.

6 CHAIRMAN BABCOCK: Keep in mind too that
7 if we say there's got to be magic language, it's
8 going to have to be on some piece of paper.

9 MR. HARWELL: The judge said earlier
10 about maybe the clerk deciding when that
11 certificate should be in there. I think the clerk
12 would really have difficulty with that. Bonnie,
13 would you agree? We don't want the onus to be on
14 the clerk to decide when that sheet should be in
15 there. That should be up to the judge --

16 MS. WOLBRUECK: Yes.

17 MR. HARWELL: -- to determine.

18 CHAIRMAN BABCOCK: It is a fairly
19 ministerial thing not to close a file until you see
20 the piece of paper.

21 MS. WOLBRUECK: That's right. I think
22 the benefit of that piece of paper would outweigh
23 any other issue.

24 CHAIRMAN BABCOCK: Because then the judge
25 comes and says "How come this is not closed?"

1 "Judge, there is no please of paper." "Oh, okay.
2 We'll get one." Sarah.

3 HONORABLE SARAH B. DUNCAN: Am I
4 understanding correctly that that certificate would
5 have no effect on substantive finality?

6 JUSTICE NATHAN HECHT: Well, it would
7 close the file. But whether --

8 HONORABLE SARAH B. DUNCAN: It would
9 be --

10 JUSTICE NATHAN HECHT: If there were no
11 legal basis, if you took, at that point when the
12 certificate is in the file and the trial courts and
13 the 30 days has passed, the trial court no longer
14 has jurisdiction over this case. So if there is a
15 legal basis for what the orders and judgment in the
16 case do, then that's final; and if there is not,
17 the Court of Appeals would reverse it.

18 HONORABLE SARAH B. DUNCAN: What if there
19 are outstanding claims that haven't been resolved
20 at the point that the certificate gets signed?

21 MR. GILSTRAP: The certificate resolves
22 them.

23 HONORABLE SARAH B. DUNCAN: But what do
24 we reverse?

25 JUSTICE NATHAN HECHT: You'd reverse,

1 you'd say that this was not -- what all of the
2 orders taken today, the last one or whatever are
3 not, do not finally dispose of all of the claims.

4 HONORABLE SARAH B. DUNCAN: I understand
5 that. But what do we reverse?

6 JUSTICE NATHAN HECHT: That judgment.
7 Whatever they're appealing from. They wouldn't
8 appeal from this certificate. They just appeal
9 from the judgment or order or whatever was in.

10 MR. WATSON: She's got a point, I mean.

11 HONORABLE SARAH B. DUNCAN: What are we
12 going to -- let's say that there are 10 Defendants,
13 multiple causes of action, summary judgments have
14 been granted in favor of the Plaintiff with respect
15 to all of the claims against three Defendants.
16 Summary judgments have been granted in favor of two
17 of the remaining Defendants. All of those are
18 correct. The only problem is we've still got a
19 couple of Defendants in here with pending claims
20 against them that have not been resolved one way or
21 the other. A certificate of appeal, appealability
22 is signed and filed.

23 JUSTICE NATHAN HECHT: I guess you would
24 have to appeal.

25 HONORABLE SARAH B. DUNCAN: What are they

1 going to -- what are we going to? We can't reverse
2 any of the ones that are correct.

3 MR. WATSON: That's the only document
4 with error in it.

5 CHAIRMAN BABCOCK: Well, no. There are
6 two options it seems to me. One option is reverse
7 and remand because it's not final.

8 HONORABLE SARAH B. DUNCAN: But we
9 can't. It's not fair to reverse correct judgments
10 that have already been signed.

11 CHAIRMAN BABCOCK: I'm saying that's one
12 option. The other option is to refer as to the
13 eight correct ones and reverse and remand as to the
14 ninth one because nothing happened.

15 HONORABLE SARAH B. DUNCAN: There's
16 nothing to reverse.

17 JUSTICE NATHAN HECHT: You'd reverse the
18 certificate.

19 CHAIRMAN BABCOCK: Yes.

20 JUSTICE NATHAN HECHT: Maybe that's an
21 argument for not calling it a certificate. Or call
22 it an Order of Closure.

23 HONORABLE SARAH B. DUNCAN: I'm not
24 disagreeing with the concept. I'm just trying to
25 work through it in my mind.

1 MR. YELENOSKY: Could you go to the trial
2 court and ask them to rescind the certificate
3 because it was mistaken?

4 CHAIRMAN BABCOCK: Well, but whatever you
5 call this thing, I would call it a final judgment,
6 the judgment says "Anything not expressly granted
7 by this judgment or by prior order is denied"; and
8 there's no basis for that denial, so that's what
9 you're reversing.

10 HONORABLE SARAH B. DUNCAN: But this is
11 entirely apart from any final judgment or magic
12 language or Mother Hubbard clauses or anything
13 else.

14 JUSTICE NATHAN HECHT: It's got to say
15 something; and maybe you're right. Maybe this is
16 an argument that it shouldn't be a certificate. It
17 should be an Order of Closure.

18 CHAIRMAN BABCOCK: I thought we were
19 going to --

20 HONORABLE SARAH B. DUNCAN: Are we
21 talking about having adjudicative language in the
22 Order of Closure?

23 CHAIRMAN BABCOCK: That's what I thought.

24 PROFESSOR ALBRIGHT: What if you had
25 presumed disposition upon the death certificate

1 being ordered? I mean, that might -- I haven't
2 thought through this all the way. But if you have
3 presumed disposition upon the death certificate
4 being signed, then your outstanding claims have
5 been denied. That may be an error because they
6 never came before the Court.

7 HONORABLE SARAH B. DUNCAN: Then it would
8 be -- it's going to be an adjudicative order.

9 PROFESSOR ALBRIGHT: Then it would be an
10 order, and then you would reverse and remand to
11 consider those three outstanding claims.

12 CHAIRMAN BABCOCK: Yes. That's what I
13 was thinking. Yes, Carl.

14 MR. HAMILTON: Do I understand that the
15 final judgment would be effective? And then how
16 long after that does this certificate have to be
17 prepared and filed?

18 HONORABLE SARAH B. DUNCAN: No. It
19 wouldn't be effective,

20 MR. HAMILTON: It would not be effective
21 until the certificate is filed?

22 JUSTICE NATHAN HECHT: Well, it would be
23 effective in the sense that it's in there; but you
24 couldn't execute on it, you wouldn't have to move
25 for new trial, you wouldn't do a turnover letter,

1 you wouldn't have to supercede it. Nothing would
2 happen until this certificate.

3 MR. HAMILTON: Is there a time limit
4 on -- I don't guess it matters about the file. It
5 just sits there.

6 JUSTICE NATHAN HECHT: Well, I was
7 wondering if anybody had any incentive to try to
8 delay this certificate that the judge would put up
9 with; but I suppose you could put in the Rule that
10 the judge shouldn't delay issuing this piece of
11 paper or signing this piece of paper; but I can't
12 think of a reason why the judge would want to do
13 that.

14 MR. HATCHELL: I think you would have to
15 probably exempt interlocutory orders, because I
16 know that a lot of judges do not want certification
17 orders, temporary injunctions, and things like
18 that.

19 JUSTICE NATHAN HECHT: No. I don't think
20 this should apply to interlocutory orders or cases
21 with multiple final orders.

22 HONORABLE HARVEY G. BROWN: I don't know
23 what we're going to call it; but I don't think we
24 should call it something like Order of Closure,
25 because we're really not closing the file, because

1 they can file motions for new trial so that that
2 seems a little misleading. It sounds like what
3 we're really doing is creating a second final
4 judgment that now has a short title that's
5 different than final judgment, but it's really just
6 another method of having a final judgment that is
7 clearer.

8 CHAIRMAN BABCOCK: Why are we calling it
9 anything other than Final Judgment with the magic
10 language? Why are we trying to inject another
11 concept? I mean, a separate piece of paper with
12 the magic language that says "Final Judgment," why
13 call it anything else?

14 MR. TIPPS: I think because it's the
15 piece of paper itself is not the final judgment.

16 CHAIRMAN BABCOCK: But why can't it be?

17 MR. TIPPS: What it really is is a notice
18 that judgment has become final in the case because
19 all claims and parties have been disposed of.

20 HONORABLE SARAH B. DUNCAN: No. That's
21 what we were just talking about. If this piece of
22 paper has adjudicative language in it that disposes
23 of claims and parties not previously disposed of,
24 it's not just --

25 MR. TIPPS: That's true.

1 HONORABLE SARAH B. DUNCAN: -- a
2 certificates of appealability.

3 CHAIRMAN BABCOCK: Let's look at it this
4 way: What is missing? Tell me what is missing?
5 We've got a piece of paper that says "Final
6 Judgment," and the first sentence says "This is a
7 final appealable judgment or order. All relief
8 requested in this case that is not expressly
9 granted in this judgment or by prior written order
10 is denied," you know, "judgment for the Defendant"
11 or "judgment for the Plaintiff."

12 MR. GILSTRAP: You have just added
13 something.

14 HONORABLE SCOTT A. BRISTER: How much and
15 how much prejudgment interest, and running from
16 when.

17 MR. GILSTRAP: The judgment generally
18 contains the way the case was decided.

19 CHAIRMAN BABCOCK: Right.

20 MR. GILSTRAP: I guess you could put
21 something in here that maybe incorporated the
22 judgment or something like that.

23 HONORABLE SARAH B. DUNCAN: Incorporate
24 all previous orders.

25 PROFESSOR DORSANEO: Then you're getting

1 back to what we're already talking about. If you
2 want just a one little simple piece of paper
3 instead of saying put a final judgment clause in,
4 you just, you know, have final judgment notice,
5 final, and then it would say very, very little; but
6 it would be needed to indicate that everything is
7 closed. It wouldn't be any different from the
8 final judgment.

9 Think about the case where you have a series
10 of orders, and the last order is one that doesn't
11 do much, okay, just dismisses the last claim that
12 wasn't adjudicated yet. In our situation we have
13 been talking about so far that last piece of paper
14 would look like this notice. It would look, it
15 would say "This is a final appealable order or
16 judgment," and that would really be kind of odd.
17 What we would probably be saying is that this piece
18 of paper finalizes this case and makes --

19 HONORABLE SARAH B. DUNCAN: Previous
20 judgments and orders.

21 PROFESSOR DORSANEO: -- the final
22 judgment or order appealable unless expressly
23 granted by, signed, et cetera. Okay. It could be
24 this one last little piece of paper that would be
25 the last thing in the process that would satisfy

1 Judge Guittard's notion that we need a final thing
2 that says "Go." Right? Whether we want to have a
3 last little separate formal thing that is clearly
4 identified as being that with the upside that that
5 provides is the issue. The downside is when you
6 read that thing, or what I'll be telling people is
7 if you ever get one of these, you better be on your
8 toes here, because this means that you are in the
9 bottom floor of the building that is about to
10 explode, okay, when the countdown stops.

11 HONORABLE SARAH B. DUNCAN: Well, we
12 could work on the language so that it really does
13 give notice that all previous judgments and orders
14 are now appealable.

15 PROFESSOR DORSANEO: Uh-huh (yes)

16 HONORABLE SARAH B. DUNCAN: We could work
17 on the language; but just the basic concept.

18 CHAIRMAN BABCOCK: Ralph.

19 MR. DUGGINS: I've written up something
20 that I called Notice of Final Judgment or Decree.
21 "A final judgment or decree was signed on" blank.
22 "The time period under Texas Rules of Civil
23 Procedure 306(a) and 329(a) and the time period to
24 perfect an appeal under Texas Rule of Appellate
25 Procedure 26 commenced on that date, presiding

1 judge."

2 PROFESSOR DORSANEO: It wouldn't
3 necessarily be just one order. Some kind of
4 language like that, though, could, you know.

5 MR. DUGGINS: That's what I was trying
6 to --

7 PROFESSOR DORSANEO: Yes.

8 MR. DUGGINS: -- follow up on your
9 thought there.

10 HONORABLE SARAH B. DUNCAN: We would need
11 to decide whether this piece of paper is going to
12 adjudicate outstanding claims, if there are any, or
13 not.

14 CHAIRMAN BABCOCK: Which way do you come
15 down on it?

16 JUSTICE NATHAN HECHT: Ralph's notice
17 might get it.

18 HONORABLE SARAH B. DUNCAN: I don't think
19 Ralph's notice is adjudicative.

20 MR. DUGGINS: No, it doesn't. I don't
21 think we should be trying to adjudicate.

22 HONORABLE SCOTT A. BRISTER: That was
23 just a notice that final judgment was signed.

24 MR. DUGGINS: That's all it is.

25 MR. JEFFERSON: But I would have the date

1 commence from the time of that notice rather than
2 from the time of the final judgment.

3 PROFESSOR DORSANEO: That notice you
4 could say disposes of all claims and parties for
5 appeal purposes would be just like the Aldridge
6 presumption, which doesn't presume any particular
7 disposition. Those claims would still be out there
8 somewhere to be dealt with somehow that we don't
9 know about. Okay? The notice could, you know,
10 finalize the case for appeal purposes and take the
11 5th on basically how those, you know, unadjudicated
12 claims are going to be handled. That's not making
13 interlocutory appeals appealable any more than the
14 Aldridge presumption does already.

15 MR. GILSTRAP: If we were designing
16 a system from scratch, everything that we do, I
17 think this might be an idea that would be
18 attractive; but we're not. We are working from the
19 existing system. And the problem is that we've got
20 the Mother Hubbard cases out there that are a
21 problem. We have taken a step today which is a
22 fairly radical step of a mandatory final judgment.
23 I question whether we should then go and take yet
24 another step and say now we're going to have a
25 separate document.

1 It seems to me at some point maybe we've
2 gotten the cart before the horse realizing that the
3 only person in this room that ultimately is going
4 to get to decide this issue is Justice Hecht. I
5 still think that probably this is not something we
6 ought to do.

7 JUSTICE NATHAN HECHT: Let me stress I
8 just think the debate is enlightening, and I know
9 my colleagues are going to ask me "Did they talk
10 about this"; and I want to be able --

11 CHAIRMAN BABCOCK: Beat it to death.

12 JUSTICE NATHAN HECHT: I want to be able
13 to say "yes."

14 MR. WATSON: Should we draft it?

15 JUSTICE NATHAN HECHT: Yes, I think you
16 should draft it.

17 MR. EDWARDS: When are you going to
18 start -- when does post judgment -- prejudgment
19 interest stop, and when does post judgment interest
20 start?

21 JUSTICE NATHAN HECHT: Yes. I mean, just
22 out of simplicity, but it is subject to thinking it
23 through, prejudgment interest, I mean, it would
24 still run from the one date, the date of the
25 certificate.

1 HONORABLE SCOTT A. BRISTER: Until the
2 death certificate.

3 JUSTICE NATHAN HECHT: You'd get
4 prejudgment interest all the way down to the
5 certificate, post judgment after. Which isn't that
6 an incentive for the --

7 MR. YELENOSKY: Winning party.

8 JUSTICE NATHAN HECHT: It's an incentive
9 for the --

10 MR. HALL: It's an incentive for the
11 Defendants to go ahead and get it signed to stop
12 prejudgment.

13 HONORABLE SCOTT A. BRISTER: It depends
14 on if you've got a contract with 18 percent or
15 what.

16 MR. EDWARDS: It depends on a lot of
17 things what the incentives are. Secondly, doesn't
18 the statute on levy of execution say when you can
19 do that or when you can get an execution issued or
20 something? Isn't that statutory?

21 JUSTICE NATHAN HECHT: Yes, it is,
22 probably.

23 MR. EDWARDS: I don't know. I'm just
24 asking.

25 CHAIRMAN BABCOCK: Why don't we take a

1 little break. Pam Baron is moving down from here
2 to over there. I've noticed this. Very stealthily
3 too, I might add. Let's take a break. Off the
4 record.

5 (Recess 3:50 p.m.- to 4:10 p.m.)

6 CHAIRMAN BABCOCK: Okay. Let's get back
7 to it. All right. We're back on the record.

8 HONORABLE SARAH B. DUNCAN: On the air.

9 CHAIRMAN BABCOCK: We're back on the
10 air. There has been a suggestion made, but this is
11 only a suggestion, that Sarah has got plenty of
12 guidance from us and can go back and do and she and
13 her committee can do their work and then report
14 back next time, and then we could get to the next
15 couple of items on the agenda, which are hopefully
16 going to be fairly quick, and maybe even
17 conceivably get done today; but I throw that out.
18 And, Sarah, you may not feel that way. You may
19 feel that you need more discussion of that, in
20 which case we're going to lose a couple of members
21 today, but they will be back tomorrow.

22 HONORABLE SARAH B. DUNCAN: At this point
23 I don't think we have voted on or gotten a sense of
24 the Committee on this concept of a piece of paper
25 that --

1 HONORABLE SCOTT A. BRISTER: Death
2 certificate.

3 HONORABLE SARAH B. DUNCAN: A death
4 certificate.

5 MR. LOW: Let me ask one question.
6 Justice Hecht, would you consider just having
7 something on it that says that you must have this
8 piece of paper regardless of what anything says?
9 Don't require anything in a final judgment, but
10 just so it wouldn't be misleading and just have,
11 and you would state that no matter what a judgment
12 says, that it's not final unless and until this
13 certificate, and then that certificate would
14 incorporate all of the existing and enforceable
15 orders, and you just file that one thing, and it
16 explains you don't have another judgment that says
17 this is final, tell them it doesn't matter? Would
18 you consider something like that?

19 JUSTICE NATHAN HECHT: Yes.

20 MR. LOW: Okay. I could --

21 CHAIRMAN BABCOCK: Okay. Hold that
22 thought for a second, Buddy. Based on the two
23 comments I've heard, that suggests to me we want to
24 keep talking about this for a little bit. So, Pam,
25 you and Alex can go. Come back tomorrow.

1 PROFESSOR ALBRIGHT: We will be back
2 tomorrow.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE SARAH B. DUNCAN: See how this
5 suits you. And obviously we can wordsmith; but
6 just its concept.

7 To me whatever this thing is, this death
8 certificate, needs to be a clean-up adjudication,
9 because almost inevitably people forget that
10 they've filed a counterclaim under the DTPA for
11 frivolous lawsuit, and now that the Plaintiff has
12 been awarded a judgment we're really going to kind
13 of let that go. Or attorneys' fees, and they
14 decided to, you know, try to figure out what the
15 attorneys' figures would be is going to cost more
16 than what the attorneys' fees already are.

17 So I think it needs to be adjudicative. It
18 needs to preserve previous orders and judgments
19 with all of their terms. Prejudgment interest
20 begins on this date and ends on this date, whatever
21 it is. So what I was thinking is something called
22 a Notice of Final Judgment and Disposition of
23 Previously Unaddressed Claims. "Pursuant to Rule,"
24 whatever this Rule is going to be, "all claims by
25 all parties in this case have either, one, been

1 deposed of by prior written orders or judgments,
2 which orders and judgments are incorporated herein
3 by reference," or two, "if not, are hereby denied.
4 Therefore this is the final appealable judgment in
5 this cause. The time periods under Rules 306(a)
6 and 329(b) and TRAP Rule 26 commence on this date,
7 signed" a date, and then the judge signs it.

8 MR. LOW: And that would incorporate the
9 plenary power of the judge, those two rules.
10 There's no other rules we need. Is that right?

11 HONORABLE SARAH B. DUNCAN: Everything
12 would run from this date. All of the procedural
13 timetables would run from this day.

14 CHAIRMAN BABCOCK: Okay. Okay. Mike,
15 you get to respond to that.

16 MR. HATCHELL: I think it's got something
17 to work with. I think that there could be some
18 unintended consequences of the statutes such as
19 prejudgment interest which must be stopped one day
20 before the quote, "judgment." And so if there is a
21 gap between the judgment and this document, as my
22 good friend Mr. Edwards says, his hundred million
23 dollar judgment drawing prejudgment interest of
24 \$20,000 a day, there is going to be some problems,
25 and the execution statues and the property code

1 affect the judgments. It just needs to be examined
2 is all I'm saying.

3 MR. LOW: Couldn't you say "This
4 shall for all purposes be treated as the Rules now
5 address final judgment," in other words, and then
6 it would be it would incorporate that, so your
7 interest would be keyed to that?

8 HONORABLE SARAH B. DUNCAN: See,
9 that's why I like the idea of having this be a
10 notice of final judgment.

11 MR. LOW: Right.

12 HONORABLE SARAH B. DUNCAN: Because
13 I don't think -- the purpose of this death
14 certificate would be for procedural timetables.
15 And I don't think it ought to affect interest or
16 custody. I mean, if there is a custody order, that
17 custody order ought to say when custody is going to
18 change. It shouldn't be determined by this
19 document; but I agree with Mike. I mean, this
20 would be radical, to use Skip's word, and there
21 would have to be a lot of Rules changed, and we
22 would have to talk to the legislature about
23 statutes.

24 PROFESSOR DORSANEO: To me the key issue
25 here is going to be the second part when you talk

1 about "or hereby deny." They've either already
2 been expressly dealt with or they haven't been; and
3 if they haven't been, they're now denied. That is
4 not essential to do it like that in order to
5 finalize the case for appeal. You just go back to
6 the Aldridge case itself. You have A sued B, and
7 then B had a third-party claim against C for
8 contribution. The judgment did not mention the
9 contribution claim. The Northeast Independent
10 School District's judgment against I think King of
11 the Hills was final for appeal purposes only. It
12 was presumed for appeal purposes that the
13 contribution claim was disposed of; but no
14 particular disposition was presumed.

15 Now nothing ever came of that contribution
16 claim; but I would just say the Committee should
17 consider saying instead of "are hereby denied" say
18 "are hereby disposed of for purposes of appeal"
19 without indicating the disposition. What will
20 happen then, that will either activate somebody to
21 do something, or you know, it won't.

22 Now do we want to deny these claims and put
23 the onus on the person to appeal, or do we just
24 want to leave them out and let the chips fall where
25 they may is kind of the question. And I guess

1 Aldridge has both of those seeds in it, because in
2 the express language it wants to deny them; but in
3 the presumption they're not denied. They're just
4 disposed of for appeal purposes.

5 MR. LOW: How can you dispose of
6 something without either granting or denying?
7 Where does it go?

8 PROFESSOR DORSANEO: Well, probably we
9 don't care, because what is going to be appealed is
10 the rest of the judgment.

11 MR. LOW: Somebody does.

12 PROFESSOR DORSANEO: What is going to be
13 appealed is the rest of it when people know that
14 the case is final and ripe to be appealed.

15 MR. LOW: If my issues haven't been
16 addressed, I would be the one appealing. If the
17 judge says "Yours is disposed of," I'd say "Well,
18 Judge, wait. Did you grant mine or deny it?" "I
19 don't know." I go "Well, I don't know either."

20 HONORABLE SARAH B. DUNCAN: Exactly.

21 PROFESSOR DORSANEO: Would you rather be
22 appealing by saying "I'm appealing; you didn't
23 grant me my relief; you disposed of my claim
24 without granting relief" or would you rather be
25 appealing, or does it not make a difference,

1 because "You denied relief to me"?

2 MR. LOW: Well, the thing is when they
3 say "disposed" it's going to be a bad word unless I
4 know how it's been disposed of. "Disposed," it
5 just goes somewhere.

6 PROFESSOR DORSANEO: It may be a small
7 matter. It may be that it just amounts to the same
8 thing to deny it; but it's not the only way to do
9 it.

10 MR. LOW: Okay.

11 MR. HAMILTON: If I understand what we're
12 saying, this piece of paper or death certificate is
13 in lieu of what we started out with, having the
14 neon sign in the judgment; and I just think that's
15 more confusing. I think that if we want to have
16 something like that, we ought to have the neon
17 sign, and then we ought to have that language in
18 the judgment instead of having two pieces of paper
19 and then the clerk send out the postcard, and
20 change that to say that this case has now been
21 disposed of finally and appellate timetables have
22 started to run or some such thing.

23 CHAIRMAN BABCOCK: Yes. Maybe I can get
24 back to something I was talking about earlier.
25 Frank, in a piece of paper that is going to dispose

1 an adjudicative claim what is it going to say?

2 Let's say you have got a fairly simple case, a

3 two-party case, a claim.

4 MR. GILSTRAP: I guess it's going to have
5 to say -- I'm not for it; but I think it's going to
6 have to say that the claims have been previously
7 decided, and they are incorporated herein, and now
8 here is our cleanup language if it's going to be a
9 adjudicative.

10 CHAIRMAN BABCOCK: Let's say that it's a
11 two-party case, one Plaintiff, one Defendant.
12 There was a partial summary judgment six months
13 ago, and now the judge is ruling on a second motion
14 for summary judgment and is going to grant it as to
15 the rest of the claim. What is that -- what is his
16 order going to look like, or what is his piece of
17 paper going to look like?

18 MR. GILSTRAP: If it has the new improved
19 Mother Hubbard language in it, it excepts out the
20 previous partial summary judgment.

21 CHAIRMAN BABCOCK: But doesn't it say
22 basically "The parties have come before me; the
23 Court has considered everything on file," and blah,
24 blah, blah, "and it's accordingly ordered, adjudged
25 and decreed that the Defendant's motion is

1 granted," et cetera, et cetera?

2 MR. GILSTRAP: The summary judgment
3 motion?

4 CHAIRMAN BABCOCK: Yes.

5 MR. GILSTRAP: I guess so.

6 CHAIRMAN BABCOCK: Okay. And then what
7 if it had our neon language in it? That would be a
8 piece of paper getting rid of the whole case,
9 wouldn't it?

10 MR. GILSTRAP: Yes, it would be.

11 CHAIRMAN BABCOCK: What's wrong with that
12 being the piece of paper? Call it "Final
13 Judgment." They say whatever they have to say to
14 dispose of what they're doing at that time, and
15 then they have the neon language.

16 HONORABLE SARAH B. DUNCAN: I think the
17 advantage of this, if I wasn't a party, if I wasn't
18 either a Movant or a Respondent, --

19 CHAIRMAN BABCOCK: Okay.

20 HONORABLE SARAH B. DUNCAN: -- more than
21 two parties in the case, and I wasn't either a
22 Movant or a Respondent --

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE SARAH B. DUNCAN: -- to that
25 second summary judgment motion, --

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE SARAH B. DUNCAN: -- I might
3 not be paying as good attention as I should to a
4 partial summary judgment that deals with two
5 parties neither of which is me. The advantage I
6 see to the death certificate is that it's not
7 directed towards anyone. It's not resolving any
8 particular motion or claim. It's a notice to all
9 the parties that the appellate -- the post judgment
10 appellate timetables are now starting. And I think
11 that is part of the problem with the Mother Hubbard
12 language in a series of partial summary judgments
13 is that not everybody is paying equal attention to
14 partial summary judgments that don't involve them.

15 CHAIRMAN BABCOCK: Okay. Let's take your
16 example. You've got Defendant 1 was granted
17 summary judgment six months ago, and now there is a
18 hearing on Defendant 2's motion for summary
19 judgment six months later, and it's granted, and
20 that disposes of all the parties and all the
21 claims. And the order granting that says "Final
22 Judgment. This is a final appealable judgment or
23 order," and then you know, the magic language that
24 we've talked about. And your concern is that
25 Defendant Number 1 wouldn't be alert enough to know

1 that that was making the decision as to him final.

2 JUSTICE NATHAN HECHT: The Plaintiff
3 wouldn't know that the order might dispose of
4 Defendant 3.

5 CHAIRMAN BABCOCK: So you have got a
6 Defendant 3.

7 JUSTICE NATHAN HECHT: Defendant 2 moves;
8 and the Plaintiff says "Well, hell, I don't have a
9 case against me anyway."

10 CHAIRMAN BABCOCK: "But I am going to go
11 to trial on Defendant 3."

12 JUSTICE NATHAN HECHT: Right.

13 CHAIRMAN BABCOCK: And six months later
14 he says "I wonder why I haven't gotten a trial
15 setting yet?"

16 JUSTICE NATHAN HECHT: Right.

17 CHAIRMAN BABCOCK: And the answer to that
18 is "Well, wait a minute, Mr. Plaintiff's lawyer.
19 Didn't you read? It says this is a final
20 appealable judgment."

21 JUSTICE NATHAN HECHT: And he says "Well,
22 you know, it was a motion by Defendant 2. It never
23 crossed my mind that the judge could commit such
24 colossal error; and all I got was a postcard that
25 said thus and so, and so I didn't file it. I

1 didn't care about Defendant 2."

2 HONORABLE SCOTT A. BRISTER: That may be
3 all that happens with this separate sheet of paper,
4 summary judgment against Defendant 2, attached
5 orders including the death certificate attached on
6 the back of that, and he may miss it entirely. But
7 you are still going to -- the deal you are going to
8 get is the postcard saying it's all over.

9 HONORABLE SARAH B. DUNCAN: Death
10 certificate.

11 CHAIRMAN BABCOCK: Carl.

12 MR. HAMILTON: Under that scenario if
13 Defendant 3 then appeals, it gets sent back.

14 JUSTICE NATHAN HECHT: No. He doesn't
15 appeal.

16 HONORABLE SCOTT A. BRISTER: No. He
17 doesn't appeal. He missed the date.

18 CHAIRMAN BABCOCK: He has a Cheshire grin
19 on his face.

20 JUSTICE NATHAN HECHT: The Plaintiff
21 messed up.

22 MR. LOW: He's calling his malpractice
23 carrier.

24 CHAIRMAN BABCOCK: His case is over, and
25 there's no appeal, and he hasn't even had to

1 respond or file a motion for summary judgment.

2 He's happy.

3 PROFESSOR DORSANEO: Sarah, what on your
4 "hereby denied" language, what makes that denial
5 wrong? In the partial summary judgment order that
6 shouldn't have been a final summary judgment order
7 disposing of more claims than you should have,
8 that's just wrong. What makes it wrong in this
9 subsequent piece of paper? Is it just wrong?

10 JUSTICE NATHAN HECHT: Yes. There's no
11 legal basis for it.

12 PROFESSOR DORSANEO: There's no legal
13 basis?

14 HONORABLE SARAH B. DUNCAN: There's no
15 notice of any kind of trial.

16 MR. ORSINGER: No hearing, no due
17 process.

18 CHAIRMAN BABCOCK: But the Plaintiff
19 knows at least that his case is over, so he better
20 do something. He can go back and file a motion for
21 new trial and say "Judge, you know, this was wrong,
22 because D3 didn't file a motion." I mean, there is
23 no basis for him to deny the Plaintiff's relief
24 against Defendant Number 3.

25 PROFESSOR DORSANEO: So it would be

1 hereby denied despite noncompliance with the Rules
2 of Civil Procedure and principles of due process.
3 That's what that would mean.

4 CHAIRMAN BABCOCK: Well, most trial
5 judges wouldn't put it that way.

6 PROFESSOR DORSANEO: What I want to make
7 certain is we don't have some sort of special
8 standard of review that's applicable to reviewing
9 this order that is now on a separate piece of paper
10 that doesn't have the same obvious infirmity that
11 it would have in the summary judgment order.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH B. DUNCAN: Can we get a
14 sense of the Committee on the death certificate
15 concept?

16 CHAIRMAN BABCOCK: Would you like that?

17 HONORABLE SARAH A. DUNCAN: I would.

18 CHAIRMAN BABCOCK: Ralph, would you like
19 that too?

20 MR. DUGGINS: That's what we were just
21 talking about.

22 CHAIRMAN BABCOCK: Okay. Anybody opposed
23 to giving a sense to Sarah about the death
24 certificate?

25 MR. DUGGINS: Just the concept.

1 CHAIRMAN BABCOCK: Does anybody want to
2 talk about it before we give them that sense? Yes,
3 Stephen.

4 MR. TIPPS: I would just offer in
5 response to your "What's wrong with requiring that
6 it be included in the last order" question, I don't
7 think there is much substantive difference between
8 the approach that we spent the first five hours
9 talking about and the death certificate concept
10 that Justice Hecht proposed. It does seem to me,
11 though, that there is much less risk for procedural
12 error and not getting it right and not using the
13 right magic words if you have a death certificate
14 that is going to have standard magic words; and
15 also I think that the death certificate is going to
16 do a better job of alerting everybody in the case
17 to the fact that the magic words have been said.

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: That seems like it should
20 be so; but we've heard several people today
21 say "Oh, no. It's too obvious. It's so obvious it
22 looks like a proforma thing, and people are going
23 to miss it." I mean, it seems like we are just
24 going to tremendous lengths. I can understand with
25 the present Mother Hubbard case because that clause

1 is not clear. It seems like we're just going to
2 great lengths to save people from not reading the
3 document; and there's always going to be people who
4 misread the document or misread the ballot.

5 CHAIRMAN BABCOCK: Yes, Elaine.

6 PROFESSOR CARLSON: I disagree, Frank. I
7 think this is going to be like notice of a DWOP.
8 You get it, and you go "Oh, geez. I better do
9 something." And I think it's a very, very bright
10 line wakeup call. They really have to be dull.

11 HONORABLE SCOTT A. BRISTER: The postcard
12 or the notice?

13 PROFESSOR CARLSON: Yes. Just getting
14 that. Just getting a postcard that says "Guess
15 what? Death certificate" just like you get a
16 postcard that says "Guess what? DWOP." That's a
17 wakeup call.

18 HONORABLE SCOTT A. BRISTER: Right.

19 HONORABLE DAVID PEEPLES: Will the
20 postcard that they get be different whether we go
21 with the death certificate or the neon sign? Won't
22 they get the same postcard in the mail?

23 MS. CORTELL: No.

24 HONORABLE DAVID PEEPLES: No?

25 HONORABLE SCOTT A. BRISTER: Why not?

1 HONORABLE SARAH B. DUNCAN: I assume
2 we're going to call the death certificate something
3 other than "Final Judgment."

4 HONORABLE SCOTT A. BRISTER: Yet the
5 postcard will say, in one case it will say "There
6 is a final judgment that was signed on this date,"
7 the other one "A death certificate that was signed
8 on this date." Both of them will say the case is
9 now over. Appellate time started running from that
10 date.

11 HONORABLE SARAH B. DUNCAN: Yes.

12 HONORABLE DAVID PEEPLES: Whatever
13 language goes in the postcard we can change either
14 way, can't we?

15 HONORABLE SARAH B. DUNCAN: Right.

16 CHAIRMAN BABCOCK: Okay. Everybody that
17 is in favor of this death certificate, to call it
18 that, concept raise your hand. Everyone that is
19 opposed raise your hand. It's 13 to 9, Sarah, so
20 it's pretty close.

21 HONORABLE SARAH B. DUNCAN: I've got a
22 mandate.

23 CHAIRMAN BABCOCK: Well, you wouldn't in
24 Mexico. That's about it.

25 MR. EDWARDS: By some standards.

1 HONORABLE SARAH B. DUNCAN: I think 13 to
2 9, I've got Florida.

3 CHAIRMAN BABCOCK: Do you want to vote
4 again? Do you want me to count them again, Sarah?

5 Well, I think it's enough of a mandate to
6 spend the time, and particularly since Justice
7 Hecht would like us to come up with some language,
8 to put it on paper. Next time we'll have an
9 overhead.

10 HONORABLE SARAH B. DUNCAN: What we may
11 do is just go ahead and draft a death certificate
12 and a magic language rule.

13 CHAIRMAN BABCOCK: Right. Yes. I think
14 that would be a good thing to do. Buddy.

15 MR. LOW: Will the death certificate be
16 drawn as if it is a stand-alone?

17 CHAIRMAN BABCOCK: Right. It's a
18 separate piece of paper.

19 MR. LOW: And, you know, make it clear
20 that regardless of what somebody else has said in
21 something?

22 HONORABLE SARAH B. DUNCAN: Uh-huh (yes)

23 MR. LOW: That's why I didn't vote. I
24 didn't understand which. Okay.

25 CHAIRMAN BABCOCK: Judge Brown.

1 HONORABLE HARVEY G. BROWN: I'd just
2 suggest that we add a comment into the Rule that
3 says what the notice, i.e. postcard should say,
4 because I think the postcard may end up being the
5 most important thing, like Elaine saying the DWOP
6 postcard.

7 MR. GILSTRAP: But are we clear that the
8 appellate timetable will run from the signing of
9 the death certificate and not the sending of the
10 postcard?

11 HONORABLE SCOTT A. BRISTER: Right.

12 CHAIRMAN BABCOCK: I think there is
13 consensus on that, isn't there, Sarah?

14 HONORABLE SARAH B. DUNCAN: Well, unless
15 you're under 306(a), unless the postcard isn't
16 sent.

17 HONORABLE SCOTT A. BRISTER: Never
18 arrives.

19 MR. EDWARDS: Then I presume you'd have an
20 amended notice of the final judgment thing or
21 whatever it is, whatever.

22 CHAIRMAN BABCOCK: Richard.

23 MR. ORSINGER: Is the judgment with the
24 neon language enforceable if the certificate is
25 never signed, or does it remain unenforceable?

1 It's there in writing and signed, but it's not
2 enforceable?

3 HONORABLE SARAH B. DUNCAN: It's my
4 understanding that all procedural steps are going
5 to run off the death certificate.

6 CHAIRMAN BABCOCK: So the answer is it
7 would not be enforceable.

8 MR. ORSINGER: No writ of execution
9 unless it's?

10 CHAIRMAN BABCOCK: Right.

11 PROFESSOR DORSANEO: That would change.
12 There are a number of things that are possible
13 before. Like indexing, abstracting, recording,
14 that would be out, turnover orders, post judgment
15 garnishment even arguably on a different timetable
16 than the execution rule. You're saying every, all
17 enforcement just out until this thing, which is
18 probably a good Rule.

19 HONORABLE SARAH B. DUNCAN: Other than
20 prejudgment.

21 PROFESSOR DORSANEO: Other than pre,
22 yes. All post judgment, all so called post
23 judgment things --

24 HONORABLE SARAH B. DUNCAN: All final
25 judgment --

1 PROFESSOR DORSANEO: -- are not
2 available.

3 HONORABLE SARAH B. DUNCAN: --
4 enforcement processes.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: When we first started this
7 discussion we were I think premised on the idea
8 that this death certificate itself was going to be
9 sent to everybody, and that was going to be the
10 great notice that everybody was going to get
11 because it would be a piece of paper that would
12 tell them what their rights are. Are we still
13 talking about that in addition to the postcard, or
14 just the postcard?

15 CHAIRMAN BABCOCK: A postcard is a Harris
16 County and I think maybe only Harris County
17 practice where in lieu of getting orders you get
18 postcards; but I don't think that we are planning
19 to write into a statewide rule the Harris County
20 practice. The only reason we've been talking about
21 the postcard is because what happens in Houston.
22 Am I right, Judge Brister?

23 HONORABLE SCOTT A. BRISTER: Yes.

24 CHAIRMAN BABCOCK: Judge Brown?

25 HONORABLE HARVEY G. BROWN: Yes.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE SARAH B. DUNCAN: Is Harris
3 County the only --

4 HONORABLE DAVID PEEPLES: We have got
5 postcards in Bexar County; but they don't get a
6 copy of the order in Bexar County. I think we must
7 be like Houston.

8 CHAIRMAN BABCOCK: Bonnie.

9 MS. WOLBRUECK: I think it's different
10 statewide. The reason for the postcard was the old
11 rule years ago said postcard, and that evolved to
12 just saying notice of the judgment, notice of
13 appeal or order. In my county we do a computer
14 generated document stuffed in a windowed envelope.

15 PROFESSOR DORSANEO: Bonnie, do you know
16 if a post -- a postcard is not first class mail, is
17 it?

18 MS. WOLBRUECK: No. And I was wondering
19 the same thing, because the statute requires, the
20 Rule rather requires first class mail; and I was
21 thinking about that.

22 PROFESSOR DORSANEO: All of these Rules
23 require first class mail, which I had understood to
24 mean in an envelope.

25 HONORABLE DAVID PEEPLES: Well, they may

1 be something in an envelope; but where I come from
2 it's not a copy of the order. It may be something
3 from the district clerk saying something like a
4 postcard used to say.

5 MS. WOLBRUECK: There are some, if the
6 attorneys provide us with self addressed envelopes
7 or copies of something, they are mailed. But
8 outside of that there is just a notice of
9 appealable order, and it's in some format.

10 CHAIRMAN BABCOCK: Frank.

11 MR. GILSTRAP: In addition we're talking
12 about two things. We are talking about the final
13 judgment with the magic words in it and it should
14 have the words "Final Judgment" at the top and the
15 death certificate.

16 HONORABLE SARAH B. DUNCAN: No.

17 CHAIRMAN BABCOCK: Well, I think that the
18 thought is that if we have a death certificate, we
19 won't have neon, magic lights and magic whatever,
20 magic words in neon in an order. Right?

21 HONORABLE SARAH B. DUNCAN: That's my
22 understanding.

23 CHAIRMAN BABCOCK: But for the purposes
24 of our discussion next time it seems to me we ought
25 to have drafting in front of us that can do it

1 either way, because we had 22 people here for this
2 vote, and it was close, and I think that we ought
3 to look at it both ways.

4 MR. GILSTRAP: But even if -- so we send
5 the death certificate, and even if the judgment is
6 not final, we send out the death certificate. If
7 it doesn't meet our usual rules of finality and it
8 didn't dispose of everybody, we send out the death
9 certificate. That makes it appealable.

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE SARAH B. DUNCAN: It also will
12 make it final.

13 MR. GILSTRAP: And by implication
14 disposes of all unresolved claims.

15 HONORABLE SARAH B. DUNCAN: Expressly.

16 CHAIRMAN BABCOCK: Right.

17 MR. GILSTRAP: Even though we don't have
18 any language signed by -- that's in the death
19 certificate, --

20 HONORABLE SARAH B. DUNCAN: Right.

21 MR. GILSTRAP: -- that language? Okay.

22 CHAIRMAN BABCOCK: Sarah.

23 HONORABLE SARAH B. DUNCAN: I wonder if
24 Bonnie would be willing to talk to the clerks in
25 some fashion? I think if everything is going to

1 run from this single piece of paper, I frankly
2 think that it would be a wonderful thing if all the
3 clerks were mandated to send a copy of this piece
4 of paper. And my only question is incrementally
5 how much more would that cost?

6 MS. WOLBRUECK: The staff time related
7 would cost more. If you consider a multi-party
8 lawsuit that has many attorneys, that document has
9 to be copied on a copy machine and then stuffed in
10 the envelope.

11 HONORABLE SARAH B. DUNCAN: But you only
12 have to send to the lead counsel in the case.

13 MS. WOLBRUECK: Well, yes, you would hope
14 that that's always true.

15 HONORABLE SCOTT A. BRISTER: You've got
16 hundreds of thousands of cases.

17 MS. WOLBRUECK: And that's a
18 whole 'nother issue in the Rule.

19 HONORABLE SARAH B. DUNCAN: Not under the
20 Rules. There's only one lead counsel in the
21 Rules.

22 HONORABLE SCOTT A. BRISTER: To keep up
23 with my docket, one of 25 civil district courts,
24 I've got to dispose of 800 cases a year just to
25 stay even times 25 not to mention the county

1 courts. You're talking about a lot of money. I'm
2 sure the way Harris County gets around the first
3 class mail right now is the deadlines don't stop.
4 The deadlines start if you receive the notice first
5 class mail or learn of the judgment. So you learn
6 of the judgment with the postcard. So really, yes,
7 we're violating the Rule; but it does the same
8 effect because you learn of the judgment.

9 CHAIRMAN BABCOCK: Carl.

10 HONORABLE SCOTT A. BRISTER: But you're
11 talking about substantial money.

12 HONORABLE SARAH B. DUNCAN: Substantial
13 money.

14 MR. HAMILTON: I would assume that you
15 were talking earlier about the clerk or somebody
16 preparing these certificates; but in a lot of the
17 south Texas counties, Hidalgo and Starr County,
18 Zapata, they will never send out copies of orders
19 unless they have self addressed, stamped
20 envelopes. And so the only way any of those orders
21 would ever be sent out would be if the lawyer
22 prepares them and gets them signed and sends them
23 out to everybody, so we have to have a service Rule
24 I guess to go along with that.

25 HONORABLE SARAH B. DUNCAN: Carl, do they

1 send out a notice of judgment?

2 MR. HAMILTON: I beg your pardon?

3 HONORABLE SARAH B. DUNCAN: Do they send
4 out anything that it's a notice of judgment?

5 MR. HAMILTON: No.

6 HONORABLE SARAH B. DUNCAN: Well, they're
7 not complying with the current Rule.

8 MR. HAMILTON: They do DWOPs.

9 HONORABLE SARAH B. DUNCAN: That's the
10 way Bexar County was until --

11 MS. WOLBRUECK: I would suggest that
12 instead of the actual document, that if the
13 language is supposedly the same on every one of
14 these, then every clerk would be in compliance just
15 by printing on their postcard the language that
16 says "Pursuant to Rule 300, you know, this," and to
17 be in compliance with the notice.

18 HONORABLE SARAH B. DUNCAN: Okay.

19 MS. WOLBRUECK: I think that's the way
20 probably most clerks would do it, not just going to
21 a copy machine and making copies of this, the one
22 that she has entered in this case and stuffing it
23 in envelopes.

24 HONORABLE SARAH B. DUNCAN: Okay.

25 MR. HARWELL: Sarah, what we can do is

1 our big conference is in January at A&M, and it's
2 early in January. As a matter of fact, it's the
3 week right after the next meeting. So if we could
4 have something to take to our conference and
5 propose to the county and district clerks as a
6 group, then we could have a good idea of how it was
7 received.

8 CHAIRMAN BABCOCK: That would be great.
9 Jan.

10 HONORABLE JAN P. PATTERSON: I have a
11 definitive answer. Postcards are first class
12 mail.

13 HONORABLE SCOTT A. BRISTER: I knew we
14 were doing it right.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE DAVID PEEPLES: Chip, the
17 numbers are 84,000 civil dispositions in Harris
18 county last fiscal year; and for the top 25
19 counties in Texas it's 340,000 pieces of paper.

20 HONORABLE TOM LAWRENCE: Well, for the JP
21 courts in Harris County add another 178,000.

22 HONORABLE DAVID PEEPLES: That's in
23 district courts. That's not county courts.

24 HONORABLE TOM LAWRENCE: I know. But
25 this is going to affect the JP courts too.

1 MR. HARWELL: But what if the order comes
2 at the same time as the death certificate?

3 MR. JEFFERSON: It usually will, I would
4 think.

5 MR. HARWELL: Then we would have -- I
6 mean, and we mail ours out in McClennan County; and
7 so I mean, we could just put them together. And it
8 might be that a lot of them do it that way, clerks
9 across the state, and we could get a good idea of
10 that in January.

11 JUSTICE NATHAN HECHT: I feel sorry for
12 the counties; but not so sorry that I don't think
13 they can afford postage to send dispository orders
14 to parties. Maybe they could raise the filing fee
15 another \$100.

16 HONORABLE SCOTT A. BRISTER: You are
17 going to have the two signed at different times.
18 The whole question is this: Why should this
19 paragraph go not -- an order we have got to have
20 anyway which is the final judgment, why should we
21 put it on a separate piece of paper? I think
22 there's compelling arguments and undergo the cost.

23 MR. JEFFERSON: It's so important so that
24 when a judgment is signed and the judge gets ready,
25 you know, to dispose of the whole case you can say

1 "Hold on a second. I have got remaining claims
2 here. You shouldn't be signing that." It gives
3 notice --

4 HONORABLE SCOTT A. BRISTER: What you can
5 do with their order.

6 MR. JEFFERSON: It gives notice at that
7 time.

8 HONORABLE SCOTT A. BRISTER: Wherever it
9 is.

10 MR. JEFFERSON: Well, it gives notice at
11 that time right then and there; and then there is
12 no question about intent. The judge knows exactly
13 what he's doing. He wants to dispose of the whole
14 case; and all the parties know it, and all the
15 parties get notice of it.

16 CHAIRMAN BABCOCK: Yes. The most
17 compelling argument that I've heard is that the
18 Plaintiff's lawyer doesn't really understand that
19 when the order comes out disposing of the summary
20 judgment for Defendant Number 2 and says this is a
21 final appealable judgment and everything is over,
22 that he doesn't realize that, that it's really
23 disposing of Defendant 3 who never filed a motion
24 for summary judgment.

25 HONORABLE SCOTT A. BRISTER: That's just

1 an argument that the language ought to be clearer.
2 Instead of "Final Judgment" it ought to say "Final
3 Judgment and Death Certificate" or "Final Judgment,
4 and we really mean it this time," you know.

5 HONORABLE SARAH B. DUNCAN: We're going
6 to draft both.

7 MR. LOW: Yes. That's what I was going
8 to say. I was going to say "Aren't they going to
9 draft both?"

10 CHAIRMAN BABCOCK: Yes.

11 MR. LOW: Because we can talk about the
12 merits of this until we repeat ourselves probably.

13 CHAIRMAN BABCOCK: Yes. I think we've
14 got a good sense of this thing. So Joan, are you
15 ready to talk about 194.2?

16 MS. JENKINS: Yes. But I thought if you
17 referred to me as Justice McClure, it might go a
18 little better.

19 CHAIRMAN BABCOCK: I'm really sorry about
20 that.

21 MS. JENKINS: I'm teasing.

22 CHAIRMAN BABCOCK: You're a bit of a blur
23 down there.

24 MS. JENKINS: My understanding is you
25 charged me last time, Chip, to go back and take a

1 look at the very lengthy proposed Rule 194 that was
2 presented to Committee last time and rework it.

3 In looking at it I first of all did some basic
4 research, and I had a couple of concepts in
5 redrafting, the first of which was thinking about
6 the comments from Judge McCown about the cost of
7 litigation and what is the purpose of this, and the
8 comments I think of Justice Duncan also.

9 It seems to me that the only reason to do an
10 either addition to Rule 194 that relates to family
11 law or a separate rule is if you're somehow going
12 to be working some sort of economic advantage to
13 the case, the family law case. I contacted the
14 lawyers across the state that practice in the
15 largest metropolitan counties being Harris,
16 Tarrant, Dallas, Travis, and Bexar; and I've
17 attached to the handout a summary of the local
18 rules for those major counties. Harris and Tarrant
19 have local rules which basically dovetail the
20 requirements that I have put into the proposed
21 addition to Rule 194.

22 And my thought process is if you look at the
23 statistics in front of that, you have 60 percent of
24 the civil cases filed in the district courts of the
25 State of Texas are family law cases. Those were

1 the statistics that I received from the Judicial
2 Information Department of the Office of Court
3 Administration. That, of course, does not even
4 take into consideration the family law cases that
5 are filed in some of the counties that allow family
6 law cases to be filed in county civil court.
7 Twenty-two percent of those, that 60 percent, are
8 filed in Harris County, seven percent in Tarrant
9 County. So if we were to adopt what I am proposing
10 today, I think you would effectively eliminate one
11 round of discovery, that being dovetailing local
12 rule requirements with the Rule 194 for about 30
13 percent of the litigants.

14 So that was the approach that I took to this
15 was looking at the economics of it and trying to
16 see whether or not there was a way to make this
17 proposal both give the family lawyers something in
18 terms of getting some benefit out of the Rule 194
19 and also answering Judge McCown's comments about
20 whether this was going to be a money saving issue
21 and why it cost so much for people to get
22 divorced.

23 I then went through the Rule that had been put
24 together and proposed by counsel, and I compared it
25 to the local rules, and I have tried to distill it

1 down as best I could to what I thought were those
2 items that absolutely must be furnished in the most
3 rudimentary of family law cases; and I decided that
4 it would be best to treat this as an addition to
5 Rule 194 rather than a separate Rule because the
6 majority or all of the current requests that come
7 out of Rule 194 are occasionally germane to family
8 law cases.

9 It is not often that we have cases involving
10 physical or mental injury; but we do have those,
11 and we do occasionally have cases where we need to
12 ask for the indemnity and insuring agreements.
13 Those are extremely rare; but my thought is if we
14 were going to keep it as brief as what I am
15 proposing today, it could simply be tacked on as an
16 addition to the Rule rather than a separate Rule,
17 and that would also be I think of economic benefit
18 to the Bar.

19 So the proposal is in front of you; and
20 basically it is broken down into two sections.
21 You're going to have suits in which spousal or
22 child support is an issue, and then you're going to
23 have the second tier which is suits for divorce or
24 annulment. Obviously if you have a suit for
25 divorce that involves spousal support or child

1 support, you're going to be picking up those things
2 at the top of the Rule as well.

3 I have tried to make this as brief as possible
4 and as simple as possible. I would ask the
5 Committee today to give me a sense of direction as
6 to, first of all, whether you have any interest in
7 adopting this at all, and if you do, I will tell
8 you that I still think that there could be some
9 reworking in terms of the actual wording of the
10 proposed Rule. As late as yesterday afternoon I
11 caught a couple of things that I think could be
12 clarified. Specifically in one I think probably
13 needs some reworking, so that's my suggestions and
14 that's the reasons for it.

15 CHAIRMAN BABCOCK: Great. Thank you.
16 Richard, what do you think about that?

17 MR. ORSINGER: This is awfully spare; but
18 if this is all the Committee will authorize, then I
19 support it.

20 CHAIRMAN BABCOCK: Ralph.

21 MR. DUGGINS: I took what Richard brought
22 us at the October meeting and circulated it to
23 Judge Randy Catterton who is one of seven family
24 law judges in Tarrant County for his reaction and
25 the reaction of the other family law judges. And

1 I'm sorry I didn't have time to make a copy of his
2 letter, but it's fairly short. If I could read it
3 into the record, I'd like to.

4 "I have talked to a majority of the family
5 judges, and each seems to think that the proposed
6 Rule will work both in the complex family law
7 litigation as well as the routine case. There may
8 be several portions of the proposed Rule that would
9 not be applicable; however a brief statement to
10 that effect in the response should be sufficient in
11 most cases.

12 As we also discussed, the Rule may include
13 some type of monetary limit, and any estate that
14 did not exceed that limit would not involve a Rule
15 194(a) request unless leave of Court was granted.

16 I'm also forwarding to you a requested Rule
17 that was sent to me by Ann Kohlmorgan.

18 Ms. Kohlmorgan is the head of the Victims Unit with
19 the District Attorney's Office and handles
20 protective orders in the family violence area. She
21 has asked that I forward this request to you; and I
22 believe she may be contacting you directly with
23 regard to the request.

24 Again, I want to thank you for allowing us to
25 have some input in the process. Sincerely, Randy

ANNA RENKEN & ASSOCIATES

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1 Catterton."

2 And he's -- I told him of Scott McCown's
3 concern about the majority of cases in Scott's
4 court; but that's the reaction of the majority of
5 Tarrant County judges that what Richard had done
6 they seemed to be inclined to think it was a good
7 idea.

8 CHAIRMAN BABCOCK: Okay. Thanks. What
9 else?

10 MS. JENKINS: The only other comment I
11 would have, Chip, is that Justice Duncan had asked
12 last time about why would we do this if you had a
13 case in which there was a premarital agreement or a
14 postmarital agreement. I discussed this with
15 several of my fellow officers on the Family Law
16 Council, and several things were pointed out with
17 regard to those comments.

18 First of all, you have premarital agreements
19 that can cover a very limited topic. For example,
20 I would say a fair percentage of our premarital
21 agreements deal only with how you're going to treat
22 income from separate property, and they don't --
23 there is still an accumulation of a community
24 estate.

25 And so I started out trying to think of a way

1 to carve out cases involving pre- and postmarital
2 agreements; but I don't think that's practical. I
3 also ran my proposed Rule by several of my judges
4 in Harris County; and they seemed to like the
5 simplicity of it because it tracked the local Rules
6 in Harris County or eliminated the requirement for
7 that. Also candidly, the consensus I got from some
8 of the other members of the Council was that the
9 previous Rule was somewhat lengthy and that it
10 might be better to start out with a Rule more of
11 this length attaching it to the current Rule, so
12 that's my thoughts on that.

13 CHAIRMAN BABCOCK: By "the previous
14 Rule," you mean the --

15 MS. JENKINS: The lengthy Rules that you
16 guys told me to go whittle down.

17 CHAIRMAN BABCOCK: Yes. Okay. Great.
18 Any other comments? How -- you said you need to
19 work on some language. Is that anything more than
20 just kind of cleanup stuff?

21 MS. JENKINS: No. It's strictly cleanup
22 stuff. For example, specifically on (m)(1) the
23 suggestion I had from one of the folks I talked to
24 yesterday was just clean up the language regarding
25 the most recent statement from all accounts with a

1 financial institution, that sort of thing, just
2 very basic, minor changes. There would not be any
3 substantive changes anticipated at all.

4 CHAIRMAN BABCOCK: Okay. Do we have any
5 more discussion on this Rule? Do I hear a motion?
6 Yes, Sarah.

7 HONORABLE SARAH B. DUNCAN: I just want
8 to point out I certainly appreciate what Joan says
9 about the majority of prenup' agreements; but in
10 family law matters we're not talking about a
11 liability insurance policy of a doctor who is a
12 Defendant or my automobile liability insurance
13 policy. We're talking about some of the most
14 personal information that any of us has. And there
15 is no provision if it's mandatory disclosure for
16 saying "Hey, wait a minute. My personal financial
17 situation isn't relevant to this divorce." And I
18 have a problem with that.

19 CHAIRMAN BABCOCK: Sarah, would a
20 response to this disclosure requirement that says,
21 you know, "The parties agree," or "I object on the
22 basis that we've got a prenup', and there's
23 absolutely no relevance to this, and I'm not going
24 to give it to you"?

25 HONORABLE SARAH B. DUNCAN: But then it's

1 just a usual, everyday request for production. I
2 mean, it's going to be the rare case where people
3 don't want me to have to disclose their most
4 intimate, personal financial information because
5 knowing that I don't want to do this gets some
6 leverage in the case.

7 CHAIRMAN BABCOCK: Go ahead, Joan.

8 MS. JENKINS: Chip, the only response I
9 can give to that is I suppose what you could do is
10 to except out from the requirements any case in
11 which you have a pre- or postmarital agreement, and
12 then those folks that have pre- or postmarital
13 agreements are going to just if they want
14 discovery, have to go slug it out.

15 That is such a minuscule portion of the cases
16 that we deal with that I think to not adopt the
17 rule in deference to those cases would be a
18 mistake; but I do understand Justice Duncan's
19 concern, and I think perhaps the responsible way to
20 remedy that would be to simply say that there is no
21 objection unless there is a pre- or postmarital
22 agreement, in which case you may object to (L) and
23 (M) and their subparts, and obviously not to all of
24 that, because if you have children involved, you're
25 still going to have to have a determination of

1 income. You're still going to have to have a
2 determination of medical benefits available for the
3 child.

4 And candidly, in looking at this there are
5 very few things if you have children that you're
6 not going to be required to disclose even if you
7 have a pre- or postmarital agreement; but I think
8 that's probably the best way to handle it. And I
9 would be happy to try and draft some language
10 excepting or addressing Justice Duncan's concerns
11 and bring that back at the next meeting if you'd
12 like for me to do that.

13 CHAIRMAN BABCOCK: Okay. Richard, yes.

14 MR. ORSINGER: This as it exists right
15 now is nothing more than a requirement to produce
16 documents; and I think we need to just stop for a
17 second and realize that even if it's alimony or
18 child support, our current request Rule, for
19 example, when you're seeking economic damages asks
20 you to specify the amount and method of calculating
21 economic damages. You could without much burden to
22 anyone require anyone who is seeking alimony or
23 child support to state the amount that they're
24 seeking, and you could put the responding party or
25 both parties to state what their net resources are

1 out of which the support would be paid.

2 And if you required this documentation or
3 maybe even request state the amount you're asking
4 for and the amount out of which you pay, the
5 smaller cases could try the whole case without
6 discovery on the basis of this response and the
7 documentation. In other words, just to make them
8 if they have a monetary claim for child support or
9 alimony, to state what it is and then state their
10 net resources.

11 Now, you know, Harris County doesn't do that.
12 Harris County is just a pure document production.
13 Tarrant County requires a summary statement of
14 income and expenses, so that's kind of getting at
15 what I'm talking about the ability to pay; but in a
16 damage suit you have to state out the damages
17 you're seeking.

18 So maybe it's not important; but it seems to
19 me like if you made the people define their
20 monetary claims and then produce the documents that
21 will resolve the monetary claims, you move the ball
22 further down the road than if you just say
23 "Here is my documents. You have got to take my
24 deposition to find out what I really want."

25 CHAIRMAN BABCOCK: I don't think you need

1 to take a deposition. You'd have to send an
2 interrogatory.

3 MR. ORSINGER: Well, okay. You've got to
4 send a set of interrogatories. But anyway, I'm not
5 saying to vote against this. I'm just saying that
6 we're making a conscious decision here to request
7 only documents and not ask people to take
8 positions.

9 CHAIRMAN BABCOCK: Yes. Yes. Yes, Judge
10 Peeples.

11 HONORABLE DAVID PEEPLES: Joan, (L)(1) I
12 think it's great to ask for an insurance card and a
13 health provider list which is right at the end. I
14 can't remember the last time in a family law case I
15 had to look at a health policy. It may be that the
16 lawyers are looking at it, and they don't bring it
17 to me. But is it really necessary? That's the
18 kind of thing that most people are not going to
19 have and they'll have to go get. Is it worth doing
20 in every case?

21 MS. JENKINS: I think it is; and I
22 thought about that. That was one of the issues
23 that Judge McCown raised last time; and I can't
24 tell you the number of times in cases that I have
25 where there are issues involving, for example, what

1 is the total policy limit, what is the deductible,
2 you know, those sorts of issues. And I do
3 frequently request the full policy; and in fact I
4 just last week had to call up a lawyer on the other
5 side and demand that they send the whole policy
6 because we have a child with special needs, and
7 we're trying to determine whether or not there's
8 going to be coverage under the policy.

9 The PPO provider list and the simple card is
10 not going to get you what you need to know, for
11 example, if you have a child under psychiatric
12 care, which is frequent in our practice, if you
13 have a child with ADD, which is frequent in our
14 practice, if you have; and most of the time you're
15 representing women who have no idea what the
16 coverage is, how much is it, what is the
17 deductible; and I think it's worthwhile to have
18 that.

19 I agree that that's probably a bit more of a
20 difficult step; but I think most people do get more
21 than a card and more than a PPO provider list.
22 They get a description of benefits.

23 HONORABLE DAVID PEEPLES: Yes. It's not
24 a big deal with me; but very commonly the guy works
25 at a job where all he knows is they take X amount

1 out of his check every two weeks for health
2 insurance, and that's all we need to know, because
3 that's going to continue to be done. I mean,
4 should we make him get all this underlying
5 information? I'm just raising the question whether
6 in most of the cases we need the policy itself.

7 MS. JENKINS: Well, perhaps --

8 HONORABLE DAVID PEEPLES: With this all
9 somebody has got to do is say "I want it," and it's
10 not objectionable.

11 MS. JENKINS: Perhaps you could just say
12 "a policy statement or description of benefits."

13 HONORABLE DAVID PEEPLES: Yes. That's a
14 big difference, isn't it?

15 MS. JENKINS: And I would certainly be
16 willing to work on that if that's --

17 MR. ORSINGER: Well, I mean, if that's
18 the point, the group policies, you can't even get a
19 copy of the group policy. It's 400 pages long.
20 All you're going to have is the little booklet that
21 they give you; but whether you need it to try the
22 case or not, the mother is going to need it to
23 figure out what kind of medical procedure she
24 should follow to get care if you get the policy
25 booklet; but most people in this day and time they

1 couldn't get their hands on their true policy if
2 they had a federal court subpoena.

3 CHAIRMAN BABCOCK: Well, and isn't that a
4 response? I mean, if you don't have it, you can't
5 get it.

6 HONORABLE SCOTT A. BRISTER: There's no
7 reason to put it in there.

8 MR. ORSINGER: Yes. I think we can take
9 the word "policy" out of here, because there's
10 probably nobody in this room that could show up
11 with a policy.

12 CHAIRMAN BABCOCK: So scratch "policy"?

13 HONORABLE SCOTT A. BRISTER: What do you
14 call that book that you get every year?

15 MR. ORSINGER: That's just a benefit
16 booklet. But the policy, I've actually seen a
17 group policy. It's usually been amended about 1500
18 times, about that thick (indicating). I don't know
19 if any of you have ever tried to actually look at a
20 group policy.

21 HONORABLE SCOTT A. BRISTER: Really
22 you're a third-party beneficiary. It's not really
23 even your policy.

24 MR. EDWARDS: But there are a lot of
25 people out there that have individual policies,

1 they choose not to be a member of a group for one
2 reason or other, and they go get something with a
3 big deductible.

4 CHAIRMAN BABCOCK: Well, I mean, this
5 would if you said "all statements and description
6 of benefits," that wouldn't preclude you from
7 producing a policy in response to that; but on the
8 other hand, it wouldn't require you to go get one
9 from your employer either. Carl had his hand up.

10 MR. HAMILTON: I was just wondering if
11 there was a reason to restrict this to coverage
12 available through employment as opposed to private
13 coverage.

14 MS. JENKINS: I had some logic behind
15 that, Carl, which is escaping me at the moment.

16 MR. ORSINGER: Well, if there is no
17 insurance through employment and there is
18 privately, we certainly would want that produced,
19 wouldn't we?

20 MS. JENKINS: Well, I guess the problem I
21 had with that was then it's going to get a little
22 more complex. You're going to have to say not just
23 what is available, because the problem is you're
24 trying to pick up what is available, number one,
25 and then -- or if they're carrying a private

1 policy, you want the private policy. You can't ask
2 them to produce available private policies. Do you
3 see what I'm saying? That was my concern.

4 MR. ORSINGER: Right.

5 MS. JENKINS: I can certainly change this
6 to say -- I was working on brevity. I can
7 certainly change this to say if insurance is
8 carried through a private provider, then provide
9 the same information.

10 CHAIRMAN BABCOCK: Well, Joan, why
11 wouldn't you just say "all statements and
12 description of benefits for any medical or health
13 insurance coverage to insure a spouse or child"
14 striking through "available through responding
15 party's employment"?

16 MS. JENKINS: Because there is a world of
17 policies available to insure a spouse or child. Do
18 you see what I'm saying?

19 CHAIRMAN BABCOCK: Right.

20 MR. JENKINS: Well, but you see, the
21 problem is sometimes they don't have the child and
22 the spouse insured. And what you need to know is
23 what do they have available through their employer,
24 because that judge is then going to tap them to
25 start carrying it. That's the issue. And so you

1 have got to pick that up; and then if they're
2 already carrying a private policy, you certainly
3 need to know that. So that's the problem I ran
4 into; but I think I can fix that, and I will
5 certainly work on that.

6 CHAIRMAN BABCOCK: Okay. Richard.

7 MR. ORSINGER: Another comment, Joan, on
8 (M)(1), I read that, and it strikes me as if you're
9 asking for statements from banks that I own stock
10 in when you say a "financial institution."

11 MS. JENKINS: That's the one, Richard,
12 that I said earlier needed to be changed --

13 MR. ORSINGER: Yes.

14 MS. JENKINS: -- and I read the change.
15 And that one needs to be corrected.

16 MR. ORSINGER: Okay.

17 MR. EDWARDS: Wouldn't you also want a
18 statement from a brokerage, stock brokerage or
19 something of that nature? Wouldn't that be just as
20 important?

21 MS. JENKINS: We considered -- my thought
22 was that financial institution is going to cover a
23 brokerage house.

24 MR. ORSINGER: No, I don't think so.

25 MS. JENKINS: All right. Okay.

1 CHAIRMAN BABCOCK: Not if these crafty
2 lawyers are on the other side.

3 MS. JENKINS: Well, I can certainly --

4 MR. ORSINGER: Couldn't you say "an
5 institution where you have money or property on
6 account"?

7 MR. EDWARDS: Yes, something like that.

8 MS. JENKINS: One would not know that I
9 had given this to Richard to look at a week ago,
10 nor that we had spent two full days together last
11 week in my office; but Richard and I will put our
12 heads together and certainly work on this.

13 HONORABLE SARAH B. DUNCAN: Richard is
14 outed.

15 MR. ORSINGER: See, I was in Houston when
16 you e-mailed this to San Antonio.

17 MS. JENKINS: With me, Richard. That's
18 what you need to know.

19 CHAIRMAN BABCOCK: What else? Yes,
20 Ralph.

21 MR. DUGGINS: On (M)(3), this is you've
22 got "prepared for a lending institution."

23 MS. JENKINS: "Filed."

24 MR. ORSINGER: No. You don't want to say
25 "filed."

1 MR. DUGGINS: Do you want to say
2 "submitted."

3 MS. JENKINS: "Submitted."

4 MR. DUGGINS: Because if it's "prepared,"
5 they can prepare it the day before and say "I
6 prepared it." There is so much monkey business in
7 all this.

8 MS. JENKINS: Yes. You have no idea.

9 MR. DUGGINS: No. Believe me. That's
10 the reason I'm interested in it. I see it; and
11 people just don't give you information or play
12 games about it; and we need to do something to move
13 it along and help the judges not have to deal with
14 it as much as they are, at least in Fort Worth.

15 CHAIRMAN BABCOCK: What else? Joan, I
16 think that was really a good job; and I think
17 you've reflected the sense of the Committee last
18 time. So we'll put it on the agenda for next, for
19 the January meeting; and you do your redrafting,
20 and we'll try to finalize it at that time.

21 MS. JENKINS: Chip, I will also have an
22 opportunity to run this by my Council. We have a
23 meeting on December 8th, so --

24 CHAIRMAN BABCOCK: Great.

25 MS. JENKINS: -- hopefully I will have a

1 lot more input into it and much more finely tuned.
2 Thank you very much.

3 CHAIRMAN BABCOCK: You bet. Well, thanks
4 everybody for hanging in there. It's 5:01, time to
5 adjourn. We'll be back at 8:30, and we'll start
6 with Pam Baron.

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(Adjourned at 5:01 p.m.)

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CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, ANNA RENKEN, Certified Shorthand
Reporter, State of Texas, hereby certify that I
reported the above hearing of the Supreme Court
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that the costs for my services in the matter are
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Given under my hand and seal of office on this the
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