

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 15th day of
June, 2001, between the hours of 1:30 p.m. and
5:12 o'clock p.m. at the Texas Law Center,
1414 Colorado, Austin, Texas 78701.

ANNA RENKEN & ASSOCIATES

(512) 323-0626

1 JUSTICE NATHAN HECHT: Let's see if we can
2 make some progress.

3 MR. LAWRENCE: I've got something to put
4 forward.

5 JUSTICE NATHAN HECHT: Go ahead.

6 MR. LAWRENCE: Rule 3(a) which is on the
7 agenda, there is a packet over there. It's a
8 four-page. There's a memorandum on the need
9 to amend Rule 3a. It's -- in Harris County
10 we've had a presiding judge statute for the
11 justice courts for about 10 or 12 years now,
12 and it was amended in 1970 -- or excuse me --
13 1997 to provide the Harris County JP Courts to
14 be able to adopt and promulgate local rules
15 for the court. The legislature passed that;
16 but they passed that with a --

17 MS. SWEENEY: Excuse me. Could the
18 record reflect that our Chair has arrived.

19 (Laughing.)

20 MR. LAWRENCE: But the legislature passed
21 that with the requirement that all 16 of the
22 JPs vote affirmatively to adopt the local
23 rules, so we subsequently have not had any
24 local rules. But the legislature this session
25 changed that to a two-thirds vote of the JPs

1 to adopt it, and that is going to be in effect
2 September 1st.

3 Now Rule 3a does not list the Justice
4 Court obviously since we've not had any until
5 now that can adopt local rules. So the
6 proposal is that we add to 3a the phrase in
7 the first paragraph "in any Justice Court
8 authorized by statute to adopt local rules."
9 If this is not adopted, then I guess
10 presumably the Harris County JP Court can
11 adopt local rules that are not subject to
12 review by anybody, so I would think it will be
13 preferable to have the Supreme Court review
14 anything that's adopted by the Harris County
15 JP; and that's the purpose of this.

16 Now when I talked to Pam Baron about it,
17 who is the subcommittee chair she brought to
18 my attention something that I had forgotten,
19 that apparently this committee adopted a
20 Rule 2 in a recodification draft last November
21 and sent up some changes, I believe; and so
22 that's why there is both a proposed 3a and a
23 proposed Rule 2 change, so they would both be
24 up before the Court for them to do whatever
25 they wished on either. And that's really what

1 this is about. It's just very simple.

2 CHAIRMAN BABCOCK: Sorry for being late.
3 So the proposal on 3a is to add just the
4 phrase "in any justice court authorized by
5 statute to adopt local rules"?

6 MR. LAWRENCE: Yes. Currently the only
7 one, of course, is Harris County; but I just
8 could see that there could be others

9 CHAIRMAN BABCOCK: Discussion on this?
10 Noncontroversial? Anybody opposed? Okay.
11 Well, that will be approved by unanimous vote
12 without anybody having to raise their hands.
13 Anything else?

14 MR. TIPPS: I just had a question, Chip.
15 I know we're not taking up 2. But do we need
16 to make the same change in 3a and 2? Is that
17 what Judge Lawrence just indicated?

18 MR. LAWRENCE: Yes. Pam Baron had
19 recommended that we change 2 also just in case
20 depending on what the Court wanted to do, if
21 they wanted to just do 3a as it exists or take
22 up the changes from 2 to last November plus
23 this added to it.

24 MR. TIPPS: Your view is it ought to be
25 in both places?

1 MR. LAWRENCE: Yes.

2 PROFESSOR CARLSON: It's Rule 2 of the
3 recodification draft.

4 MR. TIPPS: Oh, I'm sorry.

5 PROFESSOR CARLSON: Not Rule 2.

6 MR. TIPPS: I got it.

7 CHAIRMAN BABCOCK: And Justice Hecht, I
8 guess we'll follow your lead on that.

9 JUSTICE NATHAN HECHT: Let's go.

10 CHAIRMAN BABCOCK: Both?

11 JUSTICE NATHAN HECHT: Let's send both.

12 CHAIRMAN BABCOCK: Okay.

13 JUSTICE NATHAN HECHT: And whichever one
14 we get to first.

15 CHAIRMAN BABCOCK: All right. Well,
16 we'll note that that is approved. And thank
17 you. Thank you so much.

18 MR. LAWRENCE: Thank you.

19 CHAIRMAN BABCOCK: You bet. When we
20 broke for lunch we were having a thorough
21 discussion about whether or not, right Justice
22 Duncan, about a thorough discussion about
23 whether to make the revised Rule 47
24 retroactive such that unpublished opinions in
25 the past could be cited in briefs. And we

1 were sort of in the middle of that and had to
2 break for lunch; and so let's continue. Did
3 anybody have any other thoughts? John.

4 MR. MARTIN: Well, it occurs to me these
5 unpublished opinions are out there. Judges
6 might read them anyway. Law clerks might read
7 them anyway. I'd rather just have them in the
8 briefs so that if they're wrong, you can say
9 they're wrong. You can explain why the
10 reasoning is bad, or if they're right, you can
11 explain why they're right, so I favor doing it
12 retroactively.

13 CHAIRMAN BABCOCK: Stephen.

14 MR. TIPPS: I simply observed that it
15 seems to me that we need to divide the
16 discussion on retroactivity into two parts;
17 and I think Judge Brister mentioned this
18 earlier. But one issue ought to be whether or
19 not unpublished opinions can be cited, which
20 means they can be given whatever weight that a
21 Court wants to give them. But it seems to me
22 that it's a separate question whether or not
23 unpublished opinions should retroactively be
24 given precedential effect; and my sense from
25 having listened to the conversation is that

1 people may have different views on those
2 questions, so I suggest that we focus on them
3 separately.

4 CHAIRMAN BABCOCK: Yes. That's a good
5 point. And as I understand it; and Bill I
6 guess hasn't made it a back yet, but as I
7 understand it the Court, we're not talking
8 about putting language in the Rule. We're
9 talking about giving our best advice to the
10 Court on the effective date of the Rule. The
11 Court always decides what the effective date
12 is going to be, so this is just to advise the
13 Court what we think about that.

14 But you're correct that this morning we
15 did identify two distinct issues, one being
16 citeability and one precedential effect, so I
17 think we do have to keep that in mind. Yes,
18 Richard.

19 MR. ORSINGER: The current appellate rule
20 says that unpublished opinions cannot be, are
21 not precedential and cannot be cited.

22 CHAIRMAN BABCOCK: Right.

23 MR. ORSINGER: And we could choose to
24 leave that sentence in and take the "and
25 cannot be cited" off of it so that an

1 unpublished opinion remains unprecedential;
2 and that's the first half of what the current
3 Rule is.

4 If you take the sentence out entirely,
5 then you don't have any current instruction on
6 whether an unpublished opinion has
7 precedential effect.

8 CHAIRMAN BABCOCK: Yes. I just assumed
9 that the Court would deal with that in an
10 effective date notation; but we could add some
11 language to the Rule you might follow.

12 MS. SWEENEY: Well, let the record
13 reflect I wasn't here this morning, so I don't
14 know if this has been brought up or not. But
15 what have other states done? Is this --
16 surely this has come up elsewhere, has it
17 not? Or we can't be the only folks that have
18 had this.

19 JUSTICE NATHAN HECHT: Other jurisdictions
20 are all over the map, Feds are all over the
21 map, and other states are all over the map.
22 Some of them don't have a Rule at all. Some
23 of them have this Rule, or but there is lot of
24 room in the middle. There is -- there are
25 places where you can cite, but they're not

1 precedential. There -- I think there are even
2 places where you can have where the Rule says
3 they're given limited precedential value.
4 There are other jurisdictions where you can't
5 cite them.

6 Just briefly before about the '70s
7 everybody published everything, at least all
8 the Feds published most things. I think we
9 published most things, although there were
10 unpublished opinions in the state system
11 before the '70s. Then there was a big
12 national debate about whether there should be
13 unpublished opinions; and finally the federal
14 courts decided that there should be because it
15 would ease their work load because you
16 wouldn't work as hard on unpublished
17 opinions.

18 And then once they decided that along
19 about '76 or '78 then it started being debated
20 in the states, and that's when Texas took it
21 up. But I mean this committee has gone every
22 different way over the last 20 years about
23 full citation, no citation at all, limited
24 citation. So there is not any real guidance
25 that I know of that Chris and I have been able

1 to find in any other jurisdiction that would
2 say this is the way to do it in any other ways
3 in the state.

4 CHAIRMAN BABCOCK: Bobby Meadows, aren't
5 you on a federal evidence committee that is
6 wrestling with this issue?

7 MR. MEADOWS: Yes.

8 CHAIRMAN BABCOCK: Tell us what is going
9 on there.

10 MR. MEADOWS: Well, the American College
11 of Trial Lawyers has decided it is going to
12 weigh on this issue; and the Federal Rules of
13 Evidence Subcommittee or Committee of the
14 college is looking at it right now. And I
15 attended a meeting two months ago where it
16 was -- the decision was made. I mean, the
17 collective thought was that this was an
18 important issue and the college was going to
19 take a position on it and it was an
20 opportunity for me to talk about what our
21 committee had done and what the State of Texas
22 was doing with it.

23 So there is a lot of interest in it. The
24 other members of the committee who were
25 present all expressed the same level of

1 interest not only for that committee, but also
2 with what their states were doing. So that
3 work is just getting started.

4 And one of the things that they asked me
5 to do is to gather the materials that were
6 available from our earlier dialogue and
7 examination of it and make those available.

8 CHAIRMAN BABCOCK: Okay. Great what
9 else?

10 MS. SWEENEY: What is limited precedential
11 value? How do you have a limited cite?

12 JUSTICE NATHAN HECHT: Well, I'm not
13 clear what it would be. I guess you could say
14 that it was -- you could cite it for the
15 proposition that the panel of this court has
16 already decided this issue this way. You
17 could cite it for nothing more than that a
18 panel of some other court has decided this
19 issue this way which this court might choose
20 to follow or might not or might not even
21 address; but you could at least cite it.

22 HONORABLE SCOTT A. BRISTER: It would be
23 like citing a different Court of Appeals where
24 your Court of Appeals has not addressed it.
25 There's a difference between when you're on

1 the 1st Court, and the 1st Court of Appeals
2 had an opinion in the past and the 9th Court
3 of Appeals opinion. The 9th you can take or
4 leave. The 1st in my opinion you're not
5 supposed to take or leave. You have got to
6 either follow it or get en banc to reverse
7 it.

8 CHAIRMAN BABCOCK: Judge Brister, is
9 there a Rule in the 1st or 14th that requires
10 a panel to adhere to a prior panel's decision?

11 HONORABLE SCOTT A. BRISTER: No. It's I
12 say my personal opinion; because there is a
13 different residence of opinion. Some
14 people --

15 CHAIRMAN BABCOCK: I practice in those
16 courts. I just wanted to know.

17 HONORABLE SCOTT A. BRISTER: Some judges
18 feel, you know, absolutely you can do whatever
19 you think is right. And Justice O'Connor my
20 predecessor was strongly of the opinion you
21 could not go against a prior panel, but never
22 sued anybody on it, so we didn't get that
23 question answered. It's still up in the air.

24 CHAIRMAN BABCOCK: Well, I can certainly
25 see the merit in the proposition that a prior

1 unpublished opinion wouldn't bind the Court,
2 wouldn't bind; but and we've talked about and
3 there was a lot of concern about that this
4 morning. Frankly I didn't know that there was
5 any strong sentiment that it could bind the
6 Court, though. Yes, Joe.

7 MR. LATTING: Am I hearing that by
8 writing this Rule we're also deciding what
9 precedential value courts should give if we
10 allow a citation, that is, do we have to cross
11 that bridge, or could we simply say
12 "Unpublished opinions may be cited for such
13 precedential value as the Court may feel
14 appropriate," period, and let the courts
15 decide that?

16 CHAIRMAN BABCOCK: Well, that was, to
17 summarize, that was a sentiment that was
18 expressed by some this morning. That's how I
19 was looking at it.

20 MR. LATTING: Is there a motion? Was
21 there a vote?

22 HONORABLE SARAH B. DUNCAN: Yes. There
23 was a vote previously, not this meeting.

24 MR. ORSINGER: Joe, what's at issue right
25 now is that there are a significant number of

1 people that were in the room this morning and
2 many of whom are still here that are afraid if
3 you can cite an unpublished opinion, that it
4 will be given precedential effect; and
5 precedential effect is more than just
6 reasoning. It creates an obligation of some
7 degree of subsequent courts to follow along
8 with that precedent.

9 And so some of us were saying if any of
10 you are adverse to citing previously
11 unpublished opinions because you are afraid it
12 might be given precedential effect, and the
13 court that issued the opinion thought it had
14 no precedential effect, then let's rule that
15 out; but that was because we are about to take
16 a vote on whether we're going to apply this
17 citeability retroactively.

18 CHAIRMAN BABCOCK: Justice Hecht.

19 MR. LATTING: How does the retroactively
20 or not have anything to do with whether it has
21 precedential effect?

22 MR. ORSINGER: People that are
23 afraid it would have negative, have a
24 precedential effect will vote against citing
25 unpublished opinions.

1 MR. GILSTRAP: Retroactively

2 MR. ORSINGER: Retroactively. They'll
3 all be retroactive because there won't be
4 any more unpublished.

5 CHAIRMAN BABCOCK: Justice Duncan had her
6 hand up.

7 HONORABLE SARAH B. DUNCAN: I'd just like
8 to clarify that a lot of the discussion this
9 morning centered upon not that it would be
10 quote, unquote, "precedential authority"
11 either to the court that issued it or some
12 other court; but that there was a substantial
13 potential for mischief of a previously
14 unciteable, unpublished opinion becoming --

15 CHAIRMAN BABCOCK: Citeable.

16 HONORABLE SARAH B. DUNCAN: -- part of the
17 law of Texas, and that there would be a period
18 of time that that might be the only law in
19 Texas on that issue.

20 And I'm not so concerned about what a
21 Court of Appeals or the Supreme Court or Court
22 of Criminal Appeals is going to do with that
23 opinion. I'm concerned about what lawyers and
24 bankers and other types of advisers will do
25 with those opinions outside of the courtroom

1 and before the Supreme Court or the Court of
2 Criminal Appeals gets an opportunity to decide
3 the issue authoritatively.

4 CHAIRMAN BABCOCK: Ralph.

5 MR. DUGGINS: How is that any different
6 from a Bar Journal Article or a Law Review
7 article? If we took the current Rule 47.7
8 that says unpublished opinions, which is
9 Anne's point, let's don't change the Rules
10 after the game, which says "Opinions not
11 designated for publication have no
12 precedential value," leave that. "Opinions
13 not designated for publication by the Court of
14 Appeals have no precedential value, and then
15 just insert "but may be cited," period.

16 MR. LATTING: I guess the issue would be
17 if they have no precedential value, would the
18 point in citing them impliedly be for their
19 persuasive or their reasoning? Have we had a
20 motion on that?

21 MR. DUGGINS: I agree with Richard. I
22 think that's an easy way. It appears to me to
23 be an easy and practical way to deal with your
24 concern and Anne's concern which I share with
25 you.

1 MR. LATTING: Is it ripe for vote?
2 Because I would be for that and so move.

3 MR. MEADOWS: I think that's already
4 passed. Correct me if I'm wrong. But I
5 thought that's where we came out on this when
6 we took up this whole issue earlier was that
7 they were not precedential in value, I mean,
8 in terms of how they could be used; but they
9 could be cited in terms of their persuasive
10 authority.

11 MS. MCNAMARA: You mean on another day,
12 Bobby?

13 MR. MEADOWS: Yes. Long ago.

14 HONORABLE SARAH B. DUNCAN: What we
15 actually decided is what is reflected in the
16 Rule, that we wouldn't encompass within the
17 Rule any statement about previously
18 unpublished opinions' precedential value, and
19 it would just be up to the Court or the person
20 that is reviewing that opinion to decide what
21 value to give it.

22 MR. MEADOWS: But in deciding on what
23 would be a memorandum opinion I thought we
24 essentially tracked the Rule in terms of what
25 I mean the purposes behind a memorandum

1 opinion.

2 MR. GILSTRAP: But that was
3 prospectively.

4 MR. MEADOWS: See, now there's -- that's
5 -- you're bringing a new issue forward. I
6 thought in terms of whether we look back or
7 not is another question; but in terms of how
8 we define the treatment of memorandum and
9 unpublished opinions was we have done that.

10 CHAIRMAN BABCOCK: Here is how this thing
11 got started. We voted to strike 47.7, so
12 there is no longer a prohibition in this
13 Rule. In the Rule what will be effective on
14 some day there would be no longer a
15 prohibition that unpublished opinions can't be
16 cited as authoritative.

17 Now the Supreme Court -- and not only
18 that, there are not going to be any more
19 unpublished opinions going forward. So the
20 issue for the Court is do they say anything in
21 the effective date? Do they say this new Rule
22 is effective September 1 of 2001 or whatever
23 the date may be and then just leave it at
24 that? Leaving one to wonder since the current
25 Rule doesn't have any prohibition against

1 citing unpublished opinions, can you then go
2 cite an unpublished opinion or what?

3 And Bill Dorsaneo referred to it as
4 retroactivity. It's really not
5 retroactivity. It is more what are we going
6 to do about this body of law that existed
7 prior to this new Rule, what treatment are we
8 going to give that? And that's what has led
9 us to where we are today, I think.

10 MR. LATTING: Well, I am suggesting, in
11 fact I'm moving that the treatment we give it
12 is to say that this body of law be able to be
13 cited, but that it not have precedential
14 effect.

15 MR. TIPPS: Second.

16 CHAIRMAN BABCOCK: Okay. And so let's
17 see if we can get some language.
18 "Opinions" --

19 MR. TIPPS: How about "Opinions not
20 designated for publication by the Court under
21 prior Rules have no precedential value, but
22 may be cited as authoritative by counsel or by
23 a court."

24 MR. TIPPS: I second that.

25 CHAIRMAN BABCOCK: Slow do.

1 MR. TIPPS: "Opinions not designated for
2 publication by the Court of Appeals under
3 prior Rules have no precedential value, but
4 may be cited as authoritative by counsel or by
5 a court."

6 (Mr. Dorsaneo enters the conference
7 room.)

8 MR. LATTING: Uh-oh, I thought we were
9 going to get by this one.

10 MS. SWEENEY: Steve, what do you mean by
11 "authoritative"?

12 MR. TIPPS: I'm just using the same
13 word. What I personally would read that to
14 mean is that anything you cite you are citing
15 as authoritative, as authoritative in the
16 sense that it may be persuasive; but maybe the
17 word "authority" is ambiguous.

18 MR. DUGGINS: It would be better stopping
19 after "cited." Say "It may be cited,"
20 period.

21 MR. TIPPS: That may be better.

22 CHAIRMAN BABCOCK: Okay.

23 MR. LATTING: And then but is there
24 language that explicitly says that it does not
25 have precedential value?

1 MR. TIPPS: It does.

2 MR. LATTING: Okay. Because I would
3 move.

4 CHAIRMAN BABCOCK: You're okay on that?

5 MR. LATTING: Yes.

6 CHAIRMAN BABCOCK: To be sure we get the
7 language again, do you want to read it one
8 more time, Stephen?

9 MR. TIPPS: "Opinions not designated for
10 publication by the Court of Appeals under
11 prior Rules have no precedential value, but
12 may be cited," --

13 MR. DUGGINS: Period

14 MR. TIPPS: -- period. Or alternatively
15 one could say may be "cited for their
16 persuasive value."

17 MR. LATTING: No.

18 MR. DUGGINS: I wouldn't do that.

19 MR. TIPPS: No.

20 MR. LATTING: "May be cited."

21 CHAIRMAN BABCOCK: "May be cited," is
22 that what we want?

23 MR. TIPPS: "By counsel or by a court."

24 CHAIRMAN BABCOCK: Huh?

25 MR. TIPPS: Now I would leave in "by

1 counsel or by a court." I'm just tracking the
2 prior Rule.

3 MR. ORSINGER: The last clause doesn't
4 add anything because nobody but lawyers intend
5 to cite anyway; and if they do, we wouldn't
6 know about it.

7 CHAIRMAN BABCOCK: Pro se.

8 MR. ORSGINGER: Oh, they're not permitted
9 to cite?

10 CHAIRMAN BABCOCK: No. I'm saying if you
11 restrict it to counsel or the court, --

12 MR. ORSINGER: You're right.

13 CHAIRMAN BABCOCK: -- then you're
14 omitting pro se people.

15 MR. GILSTRAP: Stop at "cited."

16 CHAIRMAN BABCOCK: Put that period after
17 "cited."

18 MR. ORSINGER: Putting unpublished
19 opinions in the hands of laypeople, that is
20 really dangerous.

21 CHAIRMAN BABCOCK: Now, now, now. 47.7,
22 what would you call it?

23 MR. LATTING: Citations of Unpublished
24 Opinions.

25 CHAIRMAN BABCOCK: Chris says Use of

1 Prior Opinions. Prior Unpublished Opinions?

2 COMMITTEE MEMBERS: Yes.

3 CHAIRMAN BABCOCK: Okay. Use of Prior
4 Unpublished Opinions. Okay. So the Rule as
5 proposed is "47.7, Use of Prior Unpublished
6 Opinions: Opinions not designated for
7 publication by the Court of Appeals under
8 prior Rules have no precedential value, but
9 may be cited," period.

10 HONORABLE JAN P. PATTERSON: How about
11 "Citation Of" because we're really not
12 speaking to the whole issue of use.

13 CHAIRMAN BABCOCK: Okay. I'm sorry,
14 Judge Patterson.

15 HONORABLE JAN P. PATTERSON: The title is
16 "Citation of Prior Unpublished" or?

17 CHAIRMAN BABCOCK: Okay. I think that's
18 a good.

19 MR. LATTING: Why not just "Citation of
20 Unpublished Opinions"?

21 HONORABLE JAN P. PATTERSON: That's what
22 I --

23 MR. LATTING: You don't need to have
24 "Prior" in there. You can cite any other
25 kind of opinion.

1 HONORABLE JAN P. PATTERSON: That's fine,
2 "citation of Unpublished."

3 CHAIRMAN BABCOCK: "Citation of
4 Unpublished Opinions: Opinions not designated
5 for publication by the Court of Appeals under
6 prior Rules have no precedential value, but
7 may be cited," period.

8 PROFESSOR CARLSON: Do you have to tell
9 the Court that it's unpublished when you cite
10 it?

11 CHAIRMAN BABCOCK: Wouldn't your citation
12 form necessarily say that?

13 PROFESSOR CARLSON: Should we put that in
14 there or not?

15 MR. ORSGINER: It's not in the Texas Rules
16 of Form, because you couldn't ever cite them,
17 so we're going to have talk about --

18 CHAIRMAN BABCOCK: But you're not going
19 to have a Southwest 2nd cite.

20 MR. ORSINGER: The question is are you
21 required to parenthetical, say that it's
22 unpublished. I think we ought to leave that
23 as an ethics issue.

24 MS. SWEENEY: No. I think if we're going
25 to do this, then that's a valid point, and

1 probably that there should be. I think there
2 should be a flag on there in your cite that
3 says "unpublished opinion."

4 MR. LATTING: I accept that as a friendly
5 amendment.

6 MR. GILSTRAP: That's properly part of
7 the cite, "not designated for publication."

8 MS. SWEENEY: Is it? I mean, the point
9 is a good one. There has been no form because
10 we haven't been citing them.

11 CHAIRMAN BABCOCK: Well, it's in --

12 HONORABLE HARVEY G. BROWN: It's in the
13 Blue Book.

14 MR. GILSTRAP: It's in the Blue Book.

15 CHAIRMAN BABCOCK: Alex.

16 PROFESSOR ALBRIGHT: One thing you-all
17 have to remember, The Texas Rules of Form are
18 written by the Texas Law Review. And what
19 happens, a student from the Law Review will
20 run down to my office and say "You know, we're
21 getting ready to publish this thing again.
22 And we were just wondering if you have any new
23 ideas."

24 And so there's nothing that the Texas Law
25 Review would like better than to publish

1 another version because they make money off of
2 it; but you know, it's not the Texas Supreme
3 Court that puts out the Texas Rules of Form,
4 so if you want this required, it needs to be
5 in the Rule, and you may want to write them a
6 letter.

7 CHAIRMAN BABCOCK: We don't do that
8 anywhere else. We don't tell people how to
9 cite things anywhere else in the Rules, do we?

10 MR. MEADOWS: You could do it in local
11 rules. You'd have to look at some of those
12 things, if I want something separate and I
13 want it designated somehow. You might look at
14 the local rules.

15 CHAIRMAN BABCOCK: Yes.

16 MR. GILSTRAP: Could you read it again?

17 HONORABLE SARAH B. DUNCAN: If it doesn't
18 have precedential authority, don't you think
19 you should have to tell the Court that?

20 CHAIRMAN BABCOCK: Sure. But I'm just
21 saying do we have to say it in the Rule? Of
22 course, you're going to tell the Court this is
23 a prior unpublished opinion.

24 HONORABLE SARAH B. DUNCAN: Of course
25 "you" would tell the Court, Chip.

1 MR. ORSINGER: Even if they don't tell
2 the Court, the Court is going to read the case
3 anyway, aren't they, and then they're going to
4 figure it out for themselves? Okay. They're
5 not going to read it.

6 HONORABLE SARAH B. DUNCAN: I did not
7 respond to that question.

8 CHAIRMAN BABCOCK: Is there anything in
9 the TRAP Rules where we have told people how
10 to cite cases?

11 PROFESSOR DORSANEO: I beg your pardon?

12 CHAIRMAN BABCOCK: Is there anything in
13 the TRAP Rules where we tell people how to
14 cite cases? Because then if the Texas Form
15 Citation of the University of Texas Law Review
16 defaults on it because they don't know about
17 it, then you go to the Blue Book; and the Blue
18 Book clearly tells that on an unpublished
19 opinion you have got to cite, you've got to
20 say "unpublished."

21 HONORABLE SARAH B. DUNCAN: And how many,
22 what percentage of the briefs that are filed
23 in the Texas courts do you think follow
24 Blue Book form?

25 CHAIRMAN BABCOCK: We could have a Rule

1 say "follow Blue Book."

2 MR. ORSINGER: His mullets may follow.

3 HONORABLE DAVID PEEPLES: Why wouldn't
4 everyone know it's unpublished because it
5 doesn't have a Southwest 2nd cite?

6 CHAIRMAN BABCOCK: That was my first
7 point.

8 HONORABLE DAVID PEEPLES: Is there an
9 answer to that?

10 PROFESSOR DORSANEO: Well, the only way
11 really to know that it's not designated for
12 publication is to see that on the face of the
13 opinion itself. The last time we did this we
14 had some kind of comparable language and said
15 that you were supposed to provide a copy of it
16 to the Court and to the other parties.

17 MR. ORSINGER: But that was before they
18 became available electronically virtually.

19 PROFESSOR DORSANEO: It depends on the
20 Court.

21 HONORABLE SARAH B. DUNCAN: If we make
22 this retroactive, you will be able to cite
23 opinions that are not available to the Court
24 other than by calling up the other Court and
25 saying "Could you send me, please, a copy of

1 the opinion? And here's the cause number."

2 CHAIRMAN BABCOCK: But doesn't the
3 advocate take the risk there if they don't
4 provide you and the opposing, and if they
5 provide it to you, they've got to provide it
6 to opposing counsel, if they've don't provide
7 you with a copy of the opinion that they're so
8 hot to tell you about, don't they run the risk
9 that you're going to say "It's unpublished.
10 We can't get it. We're not going to read it,
11 and we're not going to consider it"?

12 HONORABLE SARAH B. DUNCAN: Certainly
13 they run that risk.

14 CHAIRMAN BABCOCK: And why not put that
15 burden on the advocate as opposed to.

16 HONORABLE HARVEY G. BROWN: Chip, before
17 we get on that, may we take a vote on whether
18 we're going to have this in the first place,
19 and then once that passes if you want to add
20 some more sentences?

21 CHAIRMAN BABCOCK: Okay. First Justice
22 Hecht, because he had his hand up.

23 JUSTICE NATHAN HECHT: Chris reminded me
24 that there is a case out of our court a
25 hundred years ago.

1 CHAIRMAN BABCOCK: Is it published?

2 JUSTICE NATHAN HECHT: Yes. That said
3 "We have been cited to an opinion of the Court
4 of Appeals as authority; but since it's not
5 readily available we choose not to rely on
6 it."

7 MR. ORSGINGER: Pretty radical.

8 JUSTICE NATHAN HECHT: But, I mean, that's
9 one case.

10 CHAIRMAN BABCOCK: Was that before
11 Vice President Gore --

12 (Laughter.)

13 CHAIRMAN BABCOCK: Okay. Judge Brown
14 points out that we should vote on something as
15 a preliminary matter. Do we want to vote
16 where we're pretty far down the road on
17 language, or do we want to do something else?
18 Vote on the language that we have? All
19 right.

20 MR. GILSTRAP: Could you read it again?

21 CHAIRMAN BABCOCK: Yes. 47.7 is titled
22 "Citation of Unpublished Opinions: Opinions
23 not designated for publication by the Court of
24 Appeals under prior Rules have no precedential
25 value, but may be cited," period. Everybody

1 in favor of that raise your hand. Everybody
2 against it. It passes by a vote of 15 to 5.

3 MR. GILSTRAP: Chip, does the phrase "by
4 the Court of Appeals" really add anything to
5 that? I guess conceivably there might have
6 been a Commission of Appeals or something in
7 the dark past where they didn't publish their
8 opinions.

9 MS. SWEENEY: How about a district court
10 opinion?

11 HONORABLE SARAH B. DUNCAN: How about the
12 Court of Criminal Appeals?

13 MR. ORSINGER: Harvey Brown is the only
14 district judge that's ever published an
15 opinion.

16 HONORABLE HARVEY G. BROWN: Scott has.

17 MR. ORSINGER: Scott has?

18 CHAIRMAN BABCOCK: The question is do we
19 need "by the Court of Appeals" in there? And
20 you say it potentially hurts something?

21 MR. GILSTRAP: I just don't see what it
22 adds. And conceivably I guess you could see a
23 case where there have been unpublished
24 opinions of the Court of Criminal Appeals or
25 the Commission of Appeals. I just don't

1 know.

2 CHAIRMAN BABCOCK: Okay. What do people
3 think about striking the phrase "by the Court
4 of Appeals"?

5 MR. ORSINGER: Take it out.

6 CHAIRMAN BABCOCK: Everybody in favor of
7 that? Anybody against that?

8 MR. DUGGINS: I just have a question.
9 Does that mean you can cite district court
10 opinions?

11 MR. SWEENEY: If you take it out, you
12 can.

13 MR. ORSINGER: Apparently there's only two of
14 them to cite.

15 MR. DUGGINS: No, it isn't. I mean any
16 opinion is unpublished.

17 MR. GILSTRAP: If they don't have
18 precedential value, why not?

19 MR. DUGGINS: I'm just asking.

20 PROFESSOR DORSANEO: Clarence Guittard
21 had an opinion published in the Texas Bar
22 Journal when he was a district court judge,
23 and that would be a nice one to figure out,
24 you know, what Rule that went by.

25 MR. MARTIN: We have got several judges

1 in Dallas and at least one of the Masters in
2 Dallas who will routinely write a letter with
3 a brief explanation for their ruling, maybe a
4 paragraph; and I think we're asking for
5 trouble if we start calling those opinions and
6 citing them, so I think it ought to be limited
7 to Courts of Appeals.

8 CHAIRMAN BABCOCK: Do you still want to
9 push this, Frank?

10 MR. GILSTRAP: No. That's fine. That's
11 fine.

12 CHAIRMAN BABCOCK: Okay. Frank withdraws
13 it. Okay. What else about this?

14 PROFESSOR DORSANEO: Well, I was gone, so
15 you may have already covered this. But I was
16 thinking --

17 CHAIRMAN BABCOCK: We covered a lot of
18 ground while you were gone.

19 PROFESSOR DORSANEO: -- on the bus. Yes,
20 it seems like it. That 47.3 maybe has its own
21 separate retroactivity issue," All opinions of
22 the Courts of Appeals must be made available
23 to the public including public reporting
24 services, print or electronic." That could
25 mean that a Court of Appeals has to go dig

1 those up and make them available even though
2 the Court had previously not followed that
3 practice.

4 CHAIRMAN BABCOCK: I think that what we
5 just did with 47.7 is going to cure that
6 problem, because now I think the Court can say
7 the effective date of this Rule is whatever
8 date it is.

9 PROFESSOR DORSANEO: Okay.

10 HONORABLE SARAH B. DUNCAN: How does that
11 resolve the issue, Chip?

12 CHAIRMAN BABCOCK: On this what Bill just
13 brought up?

14 HONORABLE SARAH B. DUNCAN: Yes.

15 CHAIRMAN BABCOCK: Because I would say if
16 the effective date is September 1, 2001, that
17 obliges the Court to make those opinions
18 available as of September 1; but maybe you-all
19 don't read it that way. And it seems to me
20 that we're not by Rule trying to obligate the
21 Courts of Appeals to go back to 1930 to dig up
22 all their old unpublished opinions and put
23 them on the internet; but maybe we are. I
24 mean, it's whatever you think

25 PROFESSOR DORSANEO: I don't think there

1 are any back to 1930.

2 CHAIRMAN BABCOCK: You missed this
3 morning.

4 HONORABLE SARAH B. DUNCAN: It was '42.

5 CHAIRMAN BABCOCK: Justice Duncan thinks
6 there are some.

7 PROFESSOR DORSANEO: It's like flies in a
8 pool game. Not too many.

9 CHAIRMAN BABCOCK: Okay. Well,
10 regardless of how we do it, is the sense of
11 our committee that the Courts of Appeals
12 should be obligated to go back prior to the
13 whatever the effective date of this new Rule
14 is and dig out their old unpublished opinions
15 and put it on the -- make them available in
16 some fashion? Is there any sentiment for
17 that?

18 MS. SWEENEY: Is that possible? Is that
19 even possible?

20 PROFESSOR DORSANEO: If in the minutes.

21 CHAIRMAN BABCOCK: If it is even
22 possible, is there any sentiment in favor of
23 that? I don't sense that there is. Are you
24 in favor of that?

25 PROFESSOR DORSANEO: Judge Casey, are you

1 in favor of that?

2 HONORABLE JOHN CAYCE: The one and only
3 time I'll speak. No. I don't think it would
4 be possible, quite frankly. We've got cases
5 going back to, well, the creation of the court
6 perhaps, but at least back to the time when
7 this Rule was promulgated that allowed us to
8 issue opinions that were not published and are
9 not right now we're able to retrieve; and so
10 it would just not be justified by time and
11 experience, I think.

12 CHAIRMAN BABCOCK: I sense that -- okay.
13 Anne.

14 MS. MCNAMARA: Let me just throw
15 something out. I don't have any strong
16 views. I think it would be kind of hard for
17 the Court to go back and do this. But I just
18 wonder whether we're walking into a due
19 process issue where the law is selectively
20 available to people because somebody happened
21 to give them a copy or not. I just wonder
22 whether or not we're just teeing up an
23 interesting federal due process case for some
24 time in the future.

25 HONORABLE JOHN CAYCE: But if a party is

1 going to be citing, assuming that there is a
2 case out there that is available to somebody,
3 that party is going to have the ability to
4 cite it as authority.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE JOHN CAYCE: Then the other
7 side is going to eventually get access to that
8 and to be able to address it even if necessary
9 at post submission stage; but I can't imagine
10 a situation where someone would have, unless
11 they didn't cite it and they used it in some
12 way beneath the radar screen where the other
13 parties or all the other parties involved
14 would not at some point have access.

15 So I considered that very point myself
16 and decided that that wasn't really a major
17 concern because of that.

18 CHAIRMAN BABCOCK: To perfect a due
19 process claim they would have to say "Hey, I
20 can't get my hands on a copy of this opinion"
21 at which point the opponent if they're really
22 hot on the opinion gives it to them, so then
23 they do have access to it. Paula.

24 MS. SWEENEY: I do see following up on
25 what Anne said a big firm/solo disparity. You

1 know, if you're with a firm that's been in
2 existence for 85 years, and you're opposing
3 somebody who has had his law firm in existence
4 for two years and does not have his own
5 internal library of 80-year old Courts of
6 Appeal cases, the case that the big firm may
7 choose to cite might be one of six on the
8 issue and it might be the one that supports
9 their position.

10 And do they have an obligation to give
11 you or the Court the five that don't? Do we
12 raise by doing this an obligation to advise
13 the Court when we cite an unpublished opinion
14 in our favor, "Oh, by the way, there are
15 also," because that obligation exists with
16 published opinions, "there are also these
17 other unpublished opinions that I know about
18 that don't agree with the position I'm
19 advancing"?

20 So I mean, I can see where there could be
21 a -- I don't know if you call it a due process
22 or what; but there is certainly a big
23 potential disparity there, and it's a
24 disparity that's not curable certainly by the
25 advocate's vigorously and diligently

1 advocating and researching. There is no way
2 to go find those opinions unless you can -- if
3 you're in the small firm context.

4 CHAIRMAN BABCOCK: Well, we talked about
5 this this morning; and the conclusion was that
6 to the extent unpublished opinions are out
7 there they're available online and in just
8 about -- well, if they're not available
9 online, then I guarantee you Baker, Botts
10 doesn't have a whole big library of
11 unpublished opinions.

12 MR. TIPPS: Don't be so sure.

13 MR. ORSINGER: But they will have the
14 opportunity to bill their clients for hours
15 and hours of looking for all those unpublished
16 opinions.

17 CHAIRMAN BABCOCK: Yes. And then go down
18 and plod through the old case files in the
19 courthouse. And if they're online, they're
20 pretty much available to everybody.

21 MS. SWEENEY: I'm not concerned about the
22 ones online. I agree with you. It's the ones
23 that aren't that are now -- now suddenly have
24 some value, precedential or not, certainly
25 citeable that is not equally available to

1 everybody. That is the -- I like being able
2 to cite everything that is out there; but I
3 think it needs to be equally available to
4 everyone, and in that instance it's not.

5 CHAIRMAN BABCOCK: I just frankly think
6 you're worrying about something that doesn't
7 exist. I mean, Jackson & Walker I'll tell you
8 doesn't have a whole big vat of unpublished
9 opinions that we can dive into and say "We got
10 you."

11 MR. ORSINGER: You know who is really
12 likely to do this is the D.A.'s office. The
13 D.A.'s office does have a lot of unpublished
14 opinions; but they're too busy to go look
15 through them.

16 CHAIRMAN BABCOCK: Okay. What else?
17 Judge Brown.

18 HONORABLE HARVEY G. BROWN: A slightly
19 different point. But now that we've gotten
20 past this, maybe this is going back to
21 something we've already decided. But why
22 couldn't 47.7 say "memorandum opinions and
23 unpublished opinions"? I mean, in other
24 words, why couldn't we use this exact same
25 Rule for memorandum opinions? You can cite

1 them, but they don't have precedential value.

2 CHAIRMAN BABCOCK: Well, what
3 precedential value do memorandum opinions have
4 today? Because we still we have memorandum
5 opinions in our jurisprudence today.

6 HONORABLE HARVEY G. BROWN: We did learn
7 that today. That's true. But if we are
8 trying to basically make the distinction that
9 memorandum opinions are things we're kind of
10 hoping West might not pick up, one way to do
11 that would be to say they have no precedential
12 value. Then West is unlikely to publish them
13 in Southwest 3rd or 4th.

14 PROFESSOR DORSANEO: Probably that's not
15 true.

16 HONORABLE HARVEY G. BROWN: You don't
17 think?

18 PROFESSOR DORSANEO: No. They would
19 probably say that they would still be useful
20 to lawyers who are doing research and trying
21 to decide how to argue matters.

22 CHAIRMAN BABCOCK: What? I would
23 guess -- I mean I personally would flip that
24 around and say, you know, we ought not to say
25 that either memorandum opinions or unpublished

1 opinions have no precedential value and leave
2 it to the Court to decide what; but I think
3 we're down that, beyond that now. But I don't
4 know how other Courts treat. Sarah, how do
5 the Courts treat memorandum opinions today?
6 Do you treat them as having precedent?

7 HONORABLE SARAH B. DUNCAN: It's an
8 opinion of the Court.

9 CHAIRMAN BABCOCK: And so you take it for
10 whatever weight.

11 HONORABLE SCOTT A. BRISTER: But it's
12 hard to. If you go through the list of things
13 that make it not a memorandum opinion, it's
14 hard to say it's going to be precedential.

15 CHAIRMAN BABCOCK: Right. By definition
16 it's not going to be.

17 HONORABLE SCOTT A. BRISTER: It shouldn't
18 be.

19 CHAIRMAN BABCOCK: Right. Justice Hecht.

20 JUSTICE NATHAN HECHT: Well, for example,
21 the Dallas court writes a lot of memorandum
22 opinions, and you basically can't cite them.
23 They don't say anything.

24 MR. ORSINGER: There's nothing in there
25 to cite.

1 JUSTICE NATHAN HECHT: They just say "You
2 loose, Smith vs. Jones." And so you can't
3 really tell.

4 HONORABLE JOHN CAYCE: They're published,
5 though. Have they not published some
6 memorandum opinions?

7 JUSTICE NATHAN HECHT: I don't know.

8 HONORABLE JOHN CAYCE: We don't publish
9 our memorandum opinions just as court policy;
10 but there is nothing that would prohibit us
11 from publishing. And I could see how a party
12 could refer to memorandum opinions for a
13 particular result. It may not have any
14 substance; but the Court reached a particular
15 result based on a Rule of law that was
16 governing, and there would be some
17 precedential value to it in that sense if it's
18 published; but I don't see that many published
19 memorandum opinions out there right now.

20 CHAIRMAN BABCOCK: I don't.

21 MR. GILSTRAP: But Chip?

22 CHAIRMAN BABCOCK: Yes.

23 MR. GILSTRAP: That is the situation that
24 has happened in the federal courts. That's
25 where all these unpublished opinion cases come

1 from. They have fact situation A and an
2 unpublished opinion in 1994, and the same fact
3 situation comes up today. If the unpublished
4 opinion is precedent, they have got to follow
5 it. And so it could happen.

6 HONORABLE JOHN CAYCE: I agree.

7 CHAIRMAN BABCOCK: Well, and even though
8 by definition our memorandum opinions both
9 prior to this new Rule and under the new Rule
10 you wouldn't think would have any precedential
11 value, nevertheless, Judge Cayce, you might
12 rely upon it.

13 HONORABLE JOHN CAYCE: Absolutely.

14 CHAIRMAN BABCOCK: So what do people want
15 to do? Do you want to add memorandum opinions
16 into 47.7, or do you want to leave it as we've
17 done it? Yes, Richard.

18 MR. ORSINGER: I think that we're here as
19 a result of a lengthy process involving a lot
20 of different meetings in which it was
21 comprehended that the memorandum opinion would
22 be a precedential opinion but of lesser weight
23 because it's been designated by its authors as
24 one of lesser weight. To go back and revisit
25 that fundamental concept I think calls into

1 question the legitimacy of the many votes that
2 we've taken.

3 CHAIRMAN BABCOCK: Okay. Anybody else?
4 Bill.

5 PROFESSOR DORSANEO: One of our
6 distinguished colleagues, Mr. Duggins, had
7 pointed out that we have Rule 77.3 titled
8 "Unpublished Opinions" saying that
9 unpublished opinions have no precedential
10 value and must not be cited as authority by
11 counsel or by the Court. What is that? Is
12 that the Court of -- that's a Court of
13 Criminal Appeals Rule. Are we doing anything
14 about that, or is that off our screen?

15 CHAIRMAN BABCOCK: I don't believe we
16 have jurisdiction over the Court of Criminal
17 Appeals.

18 MR. ORSINGER: It's part of the Rules of
19 Appellate Procedure.

20 HONORABLE SARAH B. DUNCAN: We have
21 jurisdiction.

22 PROFESSOR DORSANEO: Yes. Proceedings in
23 the Court of Criminal Appeals.

24 HONORABLE SARAH B. DUNCAN: You bet.

25 CHAIRMAN BABCOCK: Judge, do we have

1 jurisdiction over your court rules?

2 HONORABLE PAUL WOMACK: Well, as I
3 understand it we're both empowered to adopt
4 Rules of Appellate Procedure, so I gather that
5 each Court can do whatever it wants to. Now
6 what the effect of each Court's decision would
7 be would be another question; but you know,
8 certainly just speaking for myself I recognize
9 the value of trying to have uniform rules.

10 CHAIRMAN BABCOCK: Where is this Rule 77
11 found? Is it a TRAP Rule?

12 PROFESSOR DORSANEO: 77.3.

13 MR. GILSTRAP: TRAP Rule.

14 HONORABLE SARAH B. DUNCAN: This
15 committee had made a recommendation to the
16 Court of Criminal Appeals on many criminal
17 Rules; and whether the Court chooses to, you
18 know, go along with our suggestion is of
19 course the Court's prerogative.

20 CHAIRMAN BABCOCK: Yes. Well, it seems
21 to me that we've been focusing on Rule 47. We
22 ought to harmonize Rule 77.

23 MR. DUGGINS: That's the reason I asked.

24 MR. GILSTRAP: Chip, especially when you
25 think of how often the criminal cases have

1 been mentioned in the context of unpublished
2 opinions.

3 MR. ORSINGER: The Court of Criminal
4 Appeals' docket is more than 50 percent
5 criminal, so whatever we say about the Court
6 of Appeals is going to have an impact on the
7 criminal practice in the Court of Appeals.
8 Right?

9 HONORABLE JOHN CAYCE: Yes. Right.

10 MR. ORSINGER: So it's 77. Does Rule 77
11 apply to the Court of Criminal Appeals only?

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

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE PAUL WOMACK: Yes. That's our
16 Rule. And you're assuming that, I understood
17 you to say, you're assuming that what you
18 recommend to the Supreme Court and what the
19 Supreme Court decides to do with its appellate
20 rules in Courts of Appeals will also control
21 what happens to criminal cases in the Courts
22 of Appeals? I don't think so.

23 CHAIRMAN BABCOCK: I was just saying just
24 the opposite.

25 MR. ORSINGER: But the debate has been

1 inclusive of what the Court of Appeals would
2 do with their criminal cases.

3 HONORABLE SARAH B. DUNCAN: We only have
4 one Rule.

5 CHAIRMAN BABCOCK: Yes.

6 HONORABLE PAUL WOMACK: You only have one
7 Rule now.

8 HONORABLE SARAH B. DUNCAN: Right.

9 HONORABLE PAUL WOMACK: And that's why
10 I'm here is to find out what is going on and
11 what is motivating the considerations behind
12 the changes that you plan to recommend to the
13 Supreme Court.

14 CHAIRMAN BABCOCK: And I guess what it
15 boils down to is Rule 77 only applies to the
16 Court of Criminal Appeals. Even though this
17 committee obviously has jurisdiction over the
18 TRAP Rules of which that is a part, does the
19 Court of Criminal Appeals wish our advice
20 about Rule 77.3 which is a parallel Rule to
21 Rule 47.7?

22 I mean, the Court of Criminal Appeals
23 could treat this completely differently if
24 they chose to. I mean, the Supreme Court
25 could say to the -- the Texas Supreme Court

1 could say to the Court of Appeals, you know,
2 "Here is how you're going to do it"; but they
3 certainly can't tell the Court of Criminal
4 Appeals "Here is how you're going to do it."
5 That's up to the Court of Criminal Appeals.

6 MR. ORSINGER: Judge Womack I think is
7 saying the Court of Criminal Appeals can
8 direct the Courts of Appeals to handle the
9 criminal cases in a different way from the way
10 the Supreme Court directs the Court of Appeals
11 to handle their civil cases. Is that not
12 right, Judge Womack?

13 HONORABLE PAUL WOMACK: That's the way I
14 understand it.

15 MR. ORSINGER: Okay. That makes sense to
16 me since they're both courts of last resort.

17 CHAIRMAN BABCOCK: Right. So I suppose
18 that when we recommend the changes that we are
19 to Rule 47 that the Court of Criminal Appeals
20 would have to buy off on it, I guess, to make
21 it applicable to criminal cases.

22 HONORABLE PAUL WOMACK: Yes. Your
23 recommendations may be cited; but do not have
24 binding precedential value.

25 CHAIRMAN BABCOCK: At least they can be

1 cited.

2 HONORABLE SARAH B. DUNCAN: Hasn't this
3 committee always sent proposed amendments to
4 the Texas Rule of Appellate Procedure to both
5 courts for just that reason?

6 MR. ORSINGER: We had a harmonizing of
7 the Criminal and Civil Rules of Evidence here
8 some years ago. It was a joint effort of the
9 Court of Criminal Appeals and the Supreme
10 Court, I believe.

11 JUSTICE NATHAN HECHT: Well, and we did
12 the same thing with the Appellate Rules. And
13 throughout the Rules there are provisions that
14 say "in civil cases this and criminal cases
15 that."

16 HONORABLE PAUL WOMACK: As much as
17 possible I think uniformity is the goal. And
18 certainly Justice Hecht and I have had little
19 chats at the last stages of the amendment
20 processes to make that work out.

21 JUSTICE NATHAN HECHT: Right.

22 CHAIRMAN BABCOCK: All right. Yes.

23 HONORABLE SCOTT A. BRISTER: I'd like to
24 second Judge Brown's proposal. It does seem
25 to me the memorandum opinions that are then

1 become precedential even though by definition
2 memorandum opinion was not supposed to be
3 precedential, not supposed to be anything new
4 has the same retroactivity concerns that we've
5 been talking about about previously
6 unpublished opinions that are suddenly going
7 to be published.

8 So I want to second his proposal to make
9 it the same Rule. If you're going to
10 designate as a memorandum opinion this doesn't
11 chart any new ground, this is not a new
12 ruling, it seems like this it ought not be
13 used later by someone to say "Oh, yes, it is."

14 HONORABLE SARAH B. DUNCAN: Are you
15 talking about an opinion written under the
16 existing Rule or just an opinion written?

17 HONORABLE SCOTT A. BRISTER: New. New.
18 If you write a memorandum opinion.

19 HONORABLE SARAH B. DUNCAN: That was the
20 whole debate.

21 MR. ORSINGER: I agree.

22 HONORABLE SARAH B. DUNCAN: Was that
23 we're not going to have any body of law in
24 Texas that is not --

25 HONORABLE SCOTT A. BRISTER: The whole

1 debate was whether it's going to be private or
2 not. We're not going to have a series of
3 unciteable, unpublished opinions anymore.

4 HONORABLE SARAH B. DUNCAN: We have
5 different memories of the discussion.

6 CHAIRMAN BABCOCK: Well, we can vote on
7 anything you want. That's fine. I thought
8 just a second ago -- well, do we want to vote
9 on that? Fine with me.

10 HONORABLE JOHN CAYCE: I would just say
11 that just because a case does not stand for a
12 novel or new proposition doesn't mean it's not
13 precedent. It can have a body of precedent
14 that might include memorandum opinions.

15 CHAIRMAN BABCOCK: Yes. I feel like
16 we're going around the same circle here. But
17 should we vote this? I mean, I'd be happy
18 to.

19 MR. ORSINGER: I feel like if there is a
20 serious chance that this vote may pass, that
21 we need to go back and redebate the question
22 of whether we should have nonprecedential
23 level of law.

24 I thought that the philosophical bridge
25 we crossed was that we were going to make all

1 law available, it was going to be citeable, it
2 would be considered by the Courts; but that
3 Courts could self select their opinions as
4 being less notable, but not that they were not
5 law, because that's to me that's a second
6 class -- that's second class treatment of some
7 litigants that they will not understand, and I
8 don't understand from the standpoint of the
9 judicial system. How can you tell somebody
10 "We've just made a decision that cost you or
11 affected your life to the tune of \$500,000 or
12 we've terminated your parent/child
13 relationship or whatever we did, but it's not
14 actually law.

15 CHAIRMAN BABCOCK: We're kind of not
16 saying that. We're just kind of saying --

17 HONORABLE SARAH B. DUNCAN: Yes, you
18 are.

19 CHAIRMAN BABCOCK: -- that "By the way,
20 you just got hosed; but we're not going to
21 hose the next guy necessarily."

22 MR. ORSINGER: That's a bad opinion.

23 MR. GILSTRAP: If you'll recall, the most
24 offensive aspect of the unpublished opinion
25 problem that was, "Here I've got a white horse

1 case. It's exactly in point. The Court of
2 Appeals has ruled differently from this on a
3 case that's exactly on point." And the point
4 is that we want them to be bound by this case
5 that's exactly on point; and that can be a
6 memorandum opinion for that specific case.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE SARAH B. DUNCAN: If we're
9 going to take a vote on Judge Brown's proposal
10 or Judge Brister's proposal, I would like it
11 put on the agenda and all members notified
12 that we're going to vote on this yet again so
13 that they can have an opportunity to come and
14 have their voices heard.

15 HONORABLE SCOTT BRISTER: All I'm
16 pointing out is it's exactly the same issue as
17 the retroactivity one. It's exactly the
18 same. You're deciding after the fact that
19 something we really didn't bind ourselves
20 beforehand we're now does apply. It's exactly
21 the same as the retroactive decision. I think
22 if you adopt the retroactivity position you're
23 about to adopt, they're inconsistent.

24 CHAIRMAN BABCOCK: Well, --

25 HONORABLE JOHN CAYCE: Scott, there is

1 not anything that I'm aware of that presently
2 says we're not -- we could not bind ourselves
3 to a memorandum opinion at present; but we
4 can't bind ourselves and parties can't cite as
5 authority nonpublished opinions.

6 Now "nonpublished" may include a whole
7 world of memorandum opinions; but so I don't
8 think it's the same to say that nonpublished
9 opinions will have no precedential value and
10 also say memorandum opinions will have no
11 precedential value, because right now
12 memorandum opinions may have some precedential
13 value.

14 CHAIRMAN BABCOCK: Hold on Stephen.
15 Judge Brown, if you want to bring it to a
16 vote, I guess make a motion which maybe Judge
17 Brister will second.

18 HONORABLE HARVEY G. BROWN: Yes. I guess
19 I wasn't making a motion. I was really making
20 a point of inquiry whether, one, did we really
21 decide it before, which wasn't clear to me.
22 I'm willing to concede if people really think
23 we did. And I just wanted to raise it as a
24 point of question. I don't think I was really
25 making a formal motion.

1 CHAIRMAN BABCOCK: Okay. That's fair
2 enough. What else on 47, Rule 47?
3 All right. Have we got a Rule that we're
4 comfortable sending to the Court now with
5 those modifications? To the extent the
6 majority voted on things, Sarah.

7 MR. MEADOW: Let's debate it a lot more.

8 CHAIRMAN BABCOCK: Judge Brown.

9 HONORABLE HARVEY G. BROWN: Not to
10 micromanage it. But we did stop our
11 discussion earlier about whether we should
12 require a citation; and we stopped our
13 discussion about what leads to a more
14 important question, and that is should you at
15 least provide the other side with a copy,
16 particularly if it's not available on one of
17 the services. If it's a 1990 opinion, I
18 personally think we should require you to
19 provide a copy to the other side and me, the
20 judge. I'd kind of like to read it.

21 CHAIRMAN BABCOCK: All right. Mike, do
22 you want to respond to that?

23 MR. HATCHELL: No. Well, I don't see how
24 you can cite an unpublished opinion and not
25 give the Court a copy of it and expect it's

1 going to influence them to do anything. And
2 if you're going to cite it, it is going to be
3 attached to your brief.

4 HONORABLE HARVEY G. BROWN: You'd be
5 surprised.

6 CHAIRMAN BABCOCK: Joe.

7 MR. LATTING: I don't get it, because I
8 don't think we need to say everything that
9 could come up in every case in the Rules of
10 Procedure. I think that this is a point where
11 we're -- this could take care of itself
12 without being a Rule. That's my perception.
13 If there is abuse that the other side is not
14 getting authority, that's easily cured; and
15 certainly the Court can require a copy, so I
16 just think we ought not put things in the Rule
17 that really don't need to be there. This
18 doesn't strike me as something. I don't have
19 any proof of that; but that's how it strikes
20 me.

21 MR. MEADOWS: Harvey, couldn't we take
22 care of that with the local rule. Couldn't we
23 do that?

24 MR. LATTING: Take care of it with the
25 phone.

1 MR. ORSINGER: Alex Albright can take
2 care of it. Where did she go?

3 MR. LATTING: Pick up the phone.

4 CHAIRMAN BABCOCK: Judge Peeples.

5 HONORABLE DAVID PEEPLES: Yes.

6 CHAIRMAN BABCOCK: Pay attention now.

7 HONORABLE DAVID PEEPLES: If you want me
8 to say something, I'll say I agree with what
9 Joe Latting said. You can't micromanage
10 through the Rules on every conceivable
11 possible case. We don't have the time or the
12 brains to do it.

13 CHAIRMAN BABCOCK: And I think there's
14 just what Mike says, there is such a powerful
15 incentive that if you've got an unpublished
16 opinion that is so persuasive that it's going
17 to help your case, you're going to give it to
18 the judge if you want the judge to read it;
19 and if you give it to the judge, you've got to
20 give it to the other side. So to me that's
21 not a big problem. If anybody else thinks
22 so.

23 MR. TIPPS: And if you don't tell the
24 Court that it's an unpublished opinion, the
25 other side will hammer you with that point.

1 CHAIRMAN BABCOCK: That's another
2 incentive to be candid with the Court. You
3 get hammered if you're not. Anything else?
4 Does anybody else want to say anything about
5 requiring that unpublished be cited as
6 unpublished and providing copies to the Court
7 and opposing counsel? Any motions on that?
8 Anything else on Rule 47? Okay. Then we've
9 got a Rule to send to the Court.

10 Justice Womack, would you like us to look
11 at Rule 77 if we promise you don't have to sit
12 through the discussion?

13 HONORABLE PAUL WOMACK: I know your time
14 is valuable, so you might find a higher
15 priority.

16 CHAIRMAN BABCOCK: Fair enough. If you
17 want us to weigh in on Rule 77, just whistle
18 any time.

19 HONORABLE PAUL WOMACK: It's in our
20 minds.

21 HONORABLE JOHN CAYCE: Chip, I have just
22 got one question.

23 CHAIRMAN BABCOCK: Yes.

24 HONORABLE JOHN CAYCE: Did we discuss
25 47.2?

1 CHAIRMAN BABCOCK: 47.2. Did we
2 discussed 47.2 this morning?

3 HONORABLE JOHN CAYCE: Was that discussed
4 this morning, and did it pass in committee?

5 CHAIRMAN BABCOCK: I don't think Justice
6 Cayce that we did.

7 PROFESSOR DORSANEO: Well, we did.

8 CHAIRMAN BABCOCK: We did?

9 PROFESSOR DORSANEO: We did discuss that
10 it's a change from what -- I tried to point
11 out that it was a different matter than what
12 this committee had done before.

13 CHAIRMAN BABCOCK: Right.

14 PROFESSOR DORSANEO: Justice Cayce should
15 probably be heard on this even though.

16 HONORABLE JOHN CAYCE: Well, I just -- I
17 had a problem with this is a different
18 version, this Appendix A to your letter,
19 Chip. It's a different version than what I
20 remember was discussed; and I suppose it came
21 from Justice Hecht -- I don't know -- after
22 receiving some commentary.

23 CHAIRMAN BABCOCK: That's correct.

24 HONORABLE JOHN CAYCE: And the first
25 thing that just struck me as odd about it was

1 classifying these three categories of
2 opinions: Opinion, memorandum opinion or a
3 per curiam opinion. And we're giving, in my
4 view by that we're giving per curiam opinions
5 the status of a type of opinion that I really
6 don't think it deserves. Per curiam is simply
7 in my view one way you sign an opinion.
8 Beyond that it has no -- go ahead.

9 HONORABLE SARAH B. DUNCAN: I'd like to
10 concur in what Chief Justice Cayce is saying
11 because it seems to me a per curiam opinion
12 can either be an opinion or a memorandum
13 opinion.

14 HONORABLE JOHN CAYCE: Right.

15 PROFESSOR DORSANEO: Yes.

16 HONORABLE SARAH B. DUNCAN: And I don't
17 think --

18 HONORABLE JOHN CAYCE: Can you even cite
19 it?

20 HONORABLE SARAH B. DUNCAN: -- there is a
21 discrete third category. It has to do with
22 whether a particular judge signs the opinion.

23 HONORABLE JOHN CAYCE: Correct. And I'd
24 prefer that we retain the right that we now
25 have to either sign the opinion whether it's

1 in a memorandum opinion or a regular opinion
2 or to issue a per curiam. And but this
3 version of 47.2 would take that away from us
4 and create this whole new class of opinions
5 that don't exist.

6 HONORABLE SARAH B. DUNCAN: And as a
7 further example, we have issued some opinions
8 en banc and per curiam because of reprisal
9 considerations; and I wouldn't want to lose
10 that ability.

11 CHAIRMAN BABCOCK: Okay. So Justice
12 Cayce, to fix this you would put the word "or"
13 after "opinion" and before "a memorandum
14 opinion" and strike "or a per curiam"? That's
15 how you would fix it?

16 HONORABLE JOHN CAYCE: Yes, Chip. That
17 is good. And then the next line, "opinions
18 and memorandum." Well, let me before I speak
19 let me think how that would be rewritten. My
20 recommendation is that we retain the current
21 Rule that allows us to issue opinions by
22 signing them or issuing them per curiam; and I
23 don't have a current Rule handy, so I don't
24 know how it is worded.

25 PROFESSOR DORSANEO: It's there.

1 JUSTICE NATHAN HECHT: It's attached to
2 (b).

3 HONORABLE SARAH B. DUNCAN: "(b)(1), a
4 majority of the justices who participate in
5 considering the case must determine whether
6 the opinion is signed by a justice or will be
7 per curiam."

8 HONORABLE JOHN CAYCE: Yes. So "Opinions
9 and memorandum opinions may be signed, shall
10 be signed by a justice or" --

11 JUSTICE NATHAN HECHT: Well, you would
12 just change "per curiam." You'd change the
13 first sentence, take out the second sentence,
14 put the language, the current, reconstruct the
15 third sentence, and leave the fourth sentence
16 alone, I guess.

17 HONORABLE JOHN CAYCE: There you go.

18 MR. ORSINGER: What happens in the event
19 of dissent from an unsigned per curiam? The
20 dissenter would have an opinion and sign it?

21 HONORABLE JOHN CAYCE: Yes.

22 CHAIRMAN BABCOCK: Okay. So how would we
23 reconstruct the sentence that says "a majority
24 of the justices"?

25 JUSTICE NATHAN HECHT: "The majority of

1 justices who participate in considering the
2 case must determine whether the opinion will
3 be signed by a justice or will be per curiam,"
4 period.

5 MR. ORSINGER: Now would that be clear
6 we're talking about the majority opinion?
7 It's not a majority that is deciding whether
8 the dissenting opinion will be signed. It's
9 only the majority that's deciding whether the
10 majority opinion is going to be signed.

11 JUSTICE NATHAN HECHT: I guess I've never
12 heard of an unsigned separate opinion.

13 MR. ORSINGER: Okay. It goes without
14 saying.

15 CHAIRMAN BABCOCK: Okay. Let's keep
16 track of where we are. Can I keep track of
17 where we are? We've inserted the word "or" in
18 the first sentence between "a memorandum
19 opinion," and we've put a period after
20 "memorandum opinion," and strike "or a per
21 curiam opinion." Then we strike the next
22 sentence. Right?

23 HONORABLE JOHN CAYCE: Right.

24 CHAIRMAN BABCOCK: And then we go "A
25 majority of the justices who participate in

1 considering the case must determine whether
2 the opinion will be signed by a justice or
3 will be per curiam," period.

4 HONORABLE JOHN CAYCE: Period.

5 CHAIRMAN BABCOCK: And then strike the
6 rest of that sentence?

7 HONORABLE JOHN CAYCE: Yes.

8 HONORABLE SARAH B. DUNCAN: You have
9 created it seems to me two different
10 concepts. One is whether it will be a
11 per curiam or signed opinion. Two is whether
12 it is designated an opinion or a memorandum
13 opinion. Those are two different
14 distinctions. And that what you just read
15 deletes from 47.2 the decision by the
16 participating justices to determine whether it
17 is to be an opinion or a memorandum opinion.

18 CHAIRMAN BABCOCK: Well, could you fix
19 that by saying "A majority of the justices who
20 participate in considering the case must
21 determine whether the opinion will be signed
22 by a justice or will be per curiam and whether
23 it shall be designated opinion or memorandum
24 opinion."

25 MR. GILSTRAP: That solves the problem.

1 PROFESSOR DORSANEO: The better way to
2 fix it would be to separate a signing
3 paragraph from a designation paragraph and not
4 try to put them in the same paragraph.

5 MR. ORSINGER: Can I clarify is a
6 per curiam opinion by definition unsigned?

7 HONORABLE JOHN CAYCE: Uh-huh (yes).

8 PROFESSOR DORSANEO: It could be signed.

9 MR. ORSINGER: Could it be? Because
10 we're making it impossible in what we've got.

11 HONORABLE JOHN CAYCE: No, we're not.

12 PROFESSOR DORSANEO: Everybody could
13 sign.

14 MR. ORSINGER: Because I thought your
15 choice was between unsigned per curiam or a
16 signed opinion.

17 HONORABLE JOHN CAYCE: Per curiam is
18 unsigned.

19 MR. ORSINGER: That's what I'm saying.
20 It goes without saying per curiam is
21 unsigned?

22 HONORABLE JOHN CAYCE: That's right.

23 MR. ORSINGER: Okay.

24 CHAIRMAN BABCOCK: Okay. The way this
25 sentence reads now subject to just breaking

1 these two concepts up, "A majority of the
2 justices who participate in considering the
3 case must determine whether the opinion will
4 be signed by a justice or will be per curiam
5 and whether it will be designated an opinion
6 or a memorandum opinion."

7 MR. GILSTRAP: Are you leaving out the
8 phrase "before the opinion is handed down"?

9 CHAIRMAN BABCOCK: Yes. That was
10 suggested by Justice Hecht to be taken out.

11 MR. GILSTRAP: Okay.

12 CHAIRMAN BABCOCK: Sarah, does that fix
13 your problem?

14 HONORABLE SARAH B. DUNCAN: Yes.
15 Although I will say that I prefer the second
16 paragraph.

17 CHAIRMAN BABCOCK: Okay. Yes. That's
18 another. Okay. Now should we endeavor to
19 create two photographs of 47.2 that talks
20 about designating and then 47.3 that talks
21 about signing, or can we keep them combined in
22 this paragraph? Should we keep them combined
23 in this paragraph? To me it doesn't matter
24 much. But Judge Cayce.

25 HONORABLE JOHN CAYCE: I think it works

1 fine combined. It might be more clear
2 separate; but I assume the Court can deal with
3 that after we recommend it.

4 CHAIRMAN BABCOCK: Yes. We are talking
5 to the Judges here. We're not talking to the
6 great unwatched. Okay. How does everybody
7 feel about that? Judge Cayce is okay with
8 it. Bill is reluctantly okay with it.

9 PROFESSOR DORSANEO: Okay.

10 HONORABLE JOHN CAYCE: And Justice Duncan
11 dissents.

12 HONORABLE SARAH B. DUNCAN: Fine. I
13 think it's just a cleaner looking Rule.

14 CHAIRMAN BABCOCK: Anybody else? Okay.
15 Is everybody happy with what we've done to
16 this paragraph? Does anybody want to dissent
17 and force a vote? Okay. So that will go
18 forward with those changes.

19 You want me to read it one more time?
20 Okay. The full Rule will now read "47.2,
21 Designating and Signing Court Opinions;
22 Participating Justices. Each opinion for the
23 Court must be designated either an opinion or
24 a memorandum opinion," period. "A majority of
25 the justices who participate in considering

1 the case must determine whether the opinion
2 will be signed by a justice or will be
3 per curiam and whether it will be designated
4 an opinion or a memorandum opinion," period.
5 "The names of the participating justices must
6 be noted on all written opinions or orders of
7 the court or a panel of of the court,"
8 period. That's the Rule 47.2. Hang on.
9 "Must be designated." I don't think
10 "shall." And whether it must be designated.
11 Good catch. Okay. Anything else?

12 HONORABLE SARAH B. DUNCAN: One teeny,
13 tiny thing.

14 CHAIRMAN BABCOCK: A teeny, tiny thing?

15 HONORABLE SARAH B. DUNCAN: A teeny, tiny
16 point. In the last sentence of 47.2 --

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE SARAH B. DUNCAN: -- shouldn't
19 it be "the names of the participating justices
20 must be noted on all written opinions 'and'
21 orders of the court or a panel of the court"?

22 CHAIRMAN BABCOCK: Yes. That change will
23 be made. Anybody else? Anything else?
24 Anything else on Rule 47? Judge Cayce, have
25 you had a chance to look at everything?

1 HONORABLE JOHN CAYCE: It looks good.

2 CHAIRMAN BABCOCK: Okay. With those
3 changes then Rule 47 is in the books, except
4 Justice Hecht wanted to say something.

5 JUSTICE NATHAN HECHT: This change is
6 probably one of the more profound things the
7 committee had done in a while; and it's done
8 some fairly profound things, because it
9 doesn't affect just the mechanics of the
10 opinion writing process, although it does; but
11 it really affects the structure and scope of
12 stare decisis and a whole lot of things that
13 affect the fabric of the law.

14 And we debated on this back in the '80s;
15 and I came out the other way. And I
16 thought -- I think this -- I can't find it;
17 but I think the committee recommended in '89
18 or '90 changes that we do something like this,
19 and our Court was fairly divided on the issue,
20 and we finally came down to thinking that
21 maybe if we encouraged memorandum opinions,
22 maybe that would do the trick and their
23 wouldn't be so many unpublished opinions and
24 it wouldn't be a problem that the Bar thought
25 it was growing to be.

1 And I've since changed my mind on that.
2 In the last ten years I've become convinced
3 the other way; and I've heard all the
4 discussions. I anticipate my colleagues who
5 have not had the benefit of these discussions
6 are going to be leery of this change, so I
7 just want to be sure that I can tell them that
8 it comes from a fully considered, fully
9 argued, fully thought out deliberation of the
10 committee.

11 I know there are particular little issues
12 that I'm not so bothered about. We can make
13 those go one way or the other; but going to
14 this full citation and full publication is a
15 pretty radical change. And as I say, I think
16 I'm for it; but my colleagues and I suspect
17 Judge Womack's colleagues will want to know
18 that this committee feels like that is the way
19 to take Texas. And I am going to assume by
20 your silence that's what you think.

21 HONORABLE SARAH B. DUNCAN: Don't assume
22 that.

23 CHAIRMAN BABCOCK: Not only speaking for
24 myself; but not only do I strongly believe
25 that, but I think anybody on the court that

1 thinks otherwise ought to be required to read
2 all this.

3 JUSTICE NATHAN HECHT: Well, it's gone on
4 I know for several meetings.

5 CHAIRMAN BABCOCK: Richard.

6 MR. ORSGINGER: Justice Hecht, the last
7 committee cycle preceding this current
8 embodiment we, and Justice Guittard was still
9 with us at the time; and Bill, I think you
10 remember probably, that the committee made a
11 recommendation that we should be able to cite
12 unpublished opinions for not for precedential
13 effect, but for --

14 PROFESSOR DORSANEO: Persuasive
15 authority.

16 MR. ORSINGER: -- persuasive authority.
17 And that is different from that in the sense
18 that it's required that everything be
19 published; but the practical effect is very
20 similar. So if members of your Court are
21 looking for buy-in or continuity or something
22 of that nature, I think I'm being fair, Bill,
23 to say that we're pretty close to where we
24 were when the last constituted committee
25 addressed this issue. Would you agree with

1 that?

2 PROFESSOR DORSANEO: I agree.

3 MR. ORSINGER: And that includes Justice
4 Guittard, because he -- I remember him
5 handwriting out compromised language that we
6 all ended up. And it was elegantly written,
7 as all of his work was.

8 CHAIRMAN BABCOCK: Are you saying we're
9 not elegant?

10 HONORABLE DAVID PEEPLES: Chip.

11 CHAIRMAN BABCOCK: Yes.

12 HONORABLE DAVID PEEPLES: I'm not sure if
13 it's possible to conclude that the committee
14 thought this or that. We're mixed up on a lot
15 of things; and I would just say for myself
16 that if it turns out that West puts in the
17 hard copy books everything or close to
18 everything that the Courts of Appeals put out,
19 then we're doing something very, very bad
20 here. I mean, if that happens, we will regret
21 this decision.

22 JUSTICE NATHAN HECHT: I think my sense of
23 our Court's conversation with the West people
24 is they don't want to do anything that the Bar
25 doesn't want them to do. They want to sell

1 books; but I think if this committee or people
2 that have worked in this process said "If you
3 do that, then you're making a big mistake and
4 the Texas lawyers are going to resent it," I
5 mean, I think they would certainly factor that
6 in. But who knows what it's going to do.

7 CHAIRMAN BABCOCK: And I respect what you
8 say; but I'm frankly puzzled by it, because
9 what is the difference between whether it's in
10 a book, a hard book or it's online?

11 PROFESSOR DORSANEO: \$35 a book.

12 HONORABLE DAVID PEEPLES: You've got
13 cost. You've got space. And I just think
14 anybody who is unconcerned about that has not
15 seen what the Courts of Appeals put out.
16 There is just so much that is put out by the
17 Courts of Appeals that is utterly unworthy of
18 reading by anybody but the parties. It really
19 is. I wrote my part of it. I'm not talking
20 about anybody else. I'm talking me and what
21 I've seen. You just --

22 HONORABLE JOHN CAYCE: It is true. And
23 it's caused me to think why don't we talk
24 about some day adopting a summary affirmance
25 rule similar to what the federal courts have.

1 I mean, I really I know the lawyers wouldn't
2 like something like that; but there really is
3 a lot of junk, and we could by summary order
4 affirm so much of that without opinion.

5 But you know, the federal courts do it.
6 I don't know how much they do it; but they do
7 have a Rule that permits it. And it might be
8 one answer to this problem we're talking about
9 on down the line here.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH B. DUNCAN: I would like
12 to strongly support what Judge Peeples says.
13 Frankly if I had -- and I have been one of the
14 most vocal proponents of being able to cite
15 unpublished opinions. If I had known that the
16 Rule was going to end up with retroactivity
17 and gutting the precedential authority of
18 previously unpublished opinions without regard
19 to their merit, I probably would have voted
20 against this Rule.

21 I'm very concerned about the
22 retroactivity aspect; and I'm very concerned.
23 I think that lawyers pay a great deal of
24 attention to whether something is labeled
25 opinion or memorandum opinion; and if they

1 feel that they need to scan in the advance
2 sheets every opinion that comes out of
3 fourteen Courts of Appeals, that is an
4 impossible burden.

5 CHAIRMAN BABCOCK: Judge Brown.

6 HONORABLE HARVEY G. BROWN: Is there any
7 reason the committee couldn't take an official
8 position urging West not publish memorandum
9 opinions?

10 CHAIRMAN BABCOCK: Well, I don't think
11 there would be any reason to. I don't see any
12 bar to it; but I'm not sure we ought to be --
13 we advise the Court. We don't advise West. I
14 would think we would have to see what the
15 Court did with our handiwork first.

16 HONORABLE HARVEY G. BROWN: That's true.

17 CHAIRMAN BABCOCK: And then if the Court
18 wanted us to as their agent call up West and
19 bring them in here and put them in the middle
20 of the room and whip them for a while, I guess
21 that would be okay.

22 CHAIRMAN BABCOCK: Justice Hecht.

23 JUSTICE NATHAN HECHT: I think we need to
24 preserve the advisory role of the committee
25 and not get it out to West. We certainly

1 don't feel comfortable telling West what to
2 do; but I think West is looking for answers.
3 They're not interested in just operating in a
4 vacuum. They would like to know what the Bar
5 thinks, so I think it would be useful to pass
6 it along, which we certainly shall; but I
7 wouldn't take a position yet.

8 CHAIRMAN BABCOCK: Richard.

9 MR. ORSINGER: I think that we're more
10 than halfway through a paradigm shift away
11 from books to electronic. And my West
12 salesman told me several years ago that he's
13 not selling any new sets of Southwest
14 Reporter. It's all your CD Rom or WesLaw.

15 And so I think we're acting like we're
16 condemning all lawyers in Texas to have triple
17 the size of Southwest Reporter. If West
18 decided to publish all these memorandum
19 opinions, that would probably terminate all
20 subscriptions except for law libraries. I
21 really don't think they're going to do that.

22 I think they want to see everyone
23 transition to digital too, because there's
24 much less overhead to generate Southwest
25 Reporter on CD Rom or on WesLaw than it is to

1 put it in books and ship them around
2 everywhere.

3 CHAIRMAN BABCOCK: What I would guess
4 they would do would be create a secondary
5 reporter system.

6 MR. ORSINGER: I bet it's going to be
7 electronic. It's not going to be economically
8 feasible for the sales they're going to have
9 to invest it in the paper. That's what I
10 bet.

11 CHAIRMAN BABCOCK: I think you're right.
12 And, yes, the secondary reporter system for
13 the memorandum opinions might well be
14 electronic only. Yes, Justice Duncan.

15 HONORABLE SARAH B. DUNCAN: In light of
16 Justice Hecht's statement, would it be
17 inappropriate to have an alternate Rule sent,
18 proposed Rule sent to the Court by at least
19 the people who feel as strongly as they do on
20 retroactivity?

21 CHAIRMAN BABCOCK: I believe that if
22 there is a dissent from what we sent to the
23 Court, that the dissenters absolutely have the
24 right to note that dissent in whatever form
25 they want.

1 HONORABLE SARAH B. DUNCAN: Okay.

2 CHAIRMAN BABCOCK: So if you want to send
3 it separately, that's okay. If you want me to
4 include it in my transmittal of the Rule, that
5 would be fine too. As you may recall, the
6 summary judgment Rule went to the Court with a
7 small, but persuasive dissent.

8 HONORABLE SARAH B. DUNCAN: Which our
9 Chair, I think, authored?

10 CHAIRMAN BABCOCK: Huh? I'm talking
11 about the old no evidence summary judgment
12 Rule.

13 MR. ORSINGER: We know. And we also know
14 you got a battlefield promotion too.

15 CHAIRMAN BABCOCK: Okay. Anything else
16 about Rule 47? Okay.

17 Bill, I think you're next up again on
18 Rule 9.2.

19 PROFESSOR DORSANEO: Yes. 9.2 is the
20 filing of papers rule in the Texas Rules of
21 Appellate Procedure. And the specific issue
22 is whether the proof of mailing paragraph
23 ought to have a new subparagraph providing for
24 the proof of mailing through the use of a new
25 service provided by the U.S. Postal Service

1 called Delivery Confirmation.

2 Now a paper is timely filed if it's
3 deposited in the mail on or before the last
4 day for filing assuming it is received either
5 the mail or otherwise within 10 days after the
6 filing deadline. The proof of mailing
7 paragraph makes certain things conclusive
8 proof of the date of mailing, the first one
9 being a legible postmark affixed by the United
10 States Postal Service, the second one being a
11 receipt for registered or certified mail if
12 the receipt is endorsed by the United States
13 Postal Service, and the third one being a
14 certificate of mailing by the United States
15 Postal Service.

16 The proof of mailing provision allows the
17 Court of Appeals to consider other proof such
18 as an affidavit of counsel, but does not make
19 that other proof rise to the level of being
20 conclusive. The members of the Appellate
21 Rules Subcommittee that were available to
22 discuss this new delivery confirmation service
23 on short notice at our subcommittee meeting
24 believed that the addition of delivery
25 confirmation would be a good addition.

1 Mike Hatchell's letter indicates that
2 actually delivery confirmation which I
3 understand involves confirmation by the
4 delivering postman is actually seemingly
5 superior to the certificate of mailing, and
6 that for that reason it should be added. The
7 subcommittee also considered recommendations
8 from Dave's Bar Association.

9 CHAIRMAN BABCOCK: I noticed that.

10 PROFESSOR DORSANEO: We don't know
11 whether all Davids are members of that or
12 whether this is just some Dave somewhere.

13 CHAIRMAN BABCOCK: Peeples would know.

14 PROFESSOR DORSANEO: But it was a very
15 thoughtful proposal, well drafted to allow an
16 attorney's certificate to be conclusive proof;
17 and the subcommittee rejected that believing
18 that that would be too much of a temptation
19 once a deadline was missed to require Courts
20 of Appeals to treat an attorney's certificate
21 as conclusive proof.

22 So the bottom line is to add to 9.2b2(D)
23 an authorization for delivery confirmation to
24 serve as conclusive proof that an Appellate
25 Court will accept the date of -- well, it says

1 of the date of mailing up here. So maybe we
2 need a little more adjustment. The delivery
3 confirmation does seem to provide for the date
4 of mailing because it had the postmark on it,
5 so I guess that would be fine.

6 CHAIRMAN BABCOCK: Richard.

7 MR. ORSINGER: Bill has just raised an
8 important point, which is that this, the real
9 function of this document from the post office
10 is to have a government representative tell
11 you when delivery occurred; but we are in fact
12 using it as a government representative
13 telling us when the date of mailing occurred.
14 And so we infer the date of mailing from the
15 postmark on the proof of delivery.

16 So let's be clear. We're not using this
17 to prove delivery to the clerk of the court.
18 We're using this to prove depositing with the
19 United States Postal Service. So if you will,
20 we are drawing an inference from the postmark
21 on the proof of delivery as to what the date
22 of mailing was.

23 PROFESSOR DORSANEO: And I don't know if
24 it's -- we're crediting the postmark here
25 designation on the delivery confirmation form

1 as being an accurate reflection of when it was
2 postmarked.

3 MR. ORSINGER: Now this comes up because
4 you only have this problem if you mail
5 something to the clerk; and if you mail
6 something to the clerk on or before the due
7 date and it's received within 10 days, then
8 it's deemed to have been timely filed. If
9 it's not received within 10 days, then you
10 don't have a document filed even if you mailed
11 it 11 days beforehand, in which event you have
12 a problem of proving delivery to the clerk,
13 because it's possible that the mail was
14 delivered to the clerk, but the clerk lost the
15 documents in which event your document was
16 timely filed, but you can't establish that.

17 So there's two concepts involved in this;
18 and this is the postal service effort to prove
19 that something was delivered; and yet we're
20 putting it in a rule that is proof that
21 something was mailed.

22 PROFESSOR DORSANEO: Well, I have not
23 used this; and I don't know what the postal
24 service's idea is. The form has a place for
25 the postmark here; and you would wonder why

1 that is even on the form if it wasn't meant to
2 be a designation of the postmark.

3 MR. ORSINGER: I think we can use it for
4 this purpose; but I just want to make it clear
5 that I think the intended purpose is to show
6 the date of delivery. The ancillary purpose
7 is to show the date of mailing. It would be
8 useful for either; but we're only using it to
9 show the date of mailing, and there is a
10 separate document called proof of mailing that
11 already is available for that purpose.

12 CHAIRMAN BABCOCK: Mike.

13 MR. HATCHELL: Before we get into a long
14 debate on this, --

15 CHAIRMAN BABCOCK: You've had your fill
16 of long debates today?

17 MR. HATCHELL: Yes. I think this is a
18 very worthy consideration; but I'm not sure
19 it's ready for final approval for some of the
20 reasons that Richard says. Let me see a show
21 of hands of how many people who have ever used
22 a proof of mailing. I use them all the time.

23 MR. ORSINGER: I do too.

24 MR. HATCHELL: In my community they are
25 now extremely hard to get. If I don't make it

1 to the post office by 4:00 o'clock, I can't
2 get it.

3 PROFESSOR DORSANEO: Right. Can't get
4 it.

5 MR. HATCHELL: Now some of you practice
6 where you have a 24-hour post office. I can't
7 get it. It is conclusive proof; but I can't
8 get it. It is -- they stamp on there, you
9 know, the day it's mailed.

10 And I was in getting one the other day;
11 and the postmaster said "You really ought to
12 consider this deal which he holds up as proof
13 of confirmation." He said "It's a whole lot
14 better." I think it maybe even costs less.
15 I'm not sure. And I think it's got all the
16 information. I think they stamp it the day
17 you mail it; but you also get the proof of
18 delivery. He also said "In a few months we're
19 coming out with another parallel service that
20 you get even more information." It may be an
21 addressee only thing.

22 I think we ought to study this until our
23 next meeting and just find out all the
24 parameters of it. All I want to do is make
25 sure that the Rules insofar as our conclusive

1 proof is concerned stay contemporary with what
2 the postal service is offering.

3 CHAIRMAN BABCOCK: Judge Patterson.

4 HONORABLE JAN P. PATTERSON: I think
5 that's laudable, and I think we should study
6 it; but I do think that it's a more important
7 issue than first, than we first think, and for
8 two reasons. One, I think it can be a great
9 service to the lawyers to facilitate getting
10 the mark they need for service; and the second
11 thing is that I discussed this with our
12 clerk's office and assumed that they would not
13 want to change, but in fact they look forward
14 to the change because they spend an enormous
15 amount of time dealing with problems of
16 service and getting affidavits and
17 certificates and confirmations and checking
18 with lawyers.

19 And so if we can facilitate lawyers
20 getting the mark they need and the clerks not
21 having to spend that amount of time in
22 communication with lawyers, I think it would
23 be a great service to both of those groups.
24 And we don't often see these problems, so I
25 think it's an excellent project.

1 CHAIRMAN BABCOCK: Okay.

2 MR. ORSINGER: Chip, can I say when we
3 come back I think we also ought to consider
4 allowing the proof of delivery to create a
5 presumption of delivery to the recipient to
6 help those people whose documents have been
7 misfiled, --

8 MR. HATCHELL: Right.

9 MR. ORSINGER: -- and they can't prove
10 that the mailman gave it to the clerk other
11 than through this piece of postal process.
12 And so we need to move to that a different
13 Rule which has to do with proof of delivery to
14 the clerk rather than proof of mailing with
15 the United States Post Office.

16 PROFESSOR DORSANEO: I don't mind
17 deferring this; but it was suggested that we
18 change Rule 9.2, and maybe it's better that we
19 don't change it now until we find out more
20 about this. Somebody needs to check with the
21 postal people as to exactly how this works.
22 If Mike can volunteer to do that since I'm
23 going to be gone, it would be good. I don't
24 see on this form, for example, that it
25 confirms when the delivery was done.

1 MR. HATCHELL: I think that's coming.
2 There's another service that will do that.

3 PROFESSOR DORSANEO: The form that I have
4 in front of me and that you have available in
5 the handout just indicates postmark here. It
6 doesn't say when the delivery occurred. It
7 just confirms the delivery in some form or
8 fashion. Maybe they'll have a better form
9 that will be --

10 HONORABLE JAN P. PATTERSON: Well, and
11 Mike, Judge Womack points out that A speaks in
12 terms of having a legible postmark which might
13 by its term cover the new forms --

14 MR. HATCHELL: Uh-huh (yes)

15 PROFESSOR DORSANEO: Yes.

16 HONORABLE JAN P. PATTERSON: -- here; and
17 it might be just a matter of education for
18 lawyers. It is hard for people to get
19 postmarks; and I agree we ought to facilitate
20 that.

21 CHAIRMAN BABCOCK: So we're going to have
22 a further report in our September meeting on
23 Rule 9.2.

24 MR. HATCHELL: (Nods affirmatively.)

25 CHAIRMAN BABCOCK: Note that Mr. Hatchell

1 is nodding his head affirmatively.

2 PROFESSOR DORSANEO: Do you want us to
3 report again on Dave's suggestion that an
4 affidavit, really a certificate would be
5 adequate to be conclusive proof, or can we --

6 HONORABLE JAN P. PATTERSON: No.

7 CHAIRMAN BABCOCK: Only if you recommend
8 it.

9 PROFESSOR DORSANEO: No.

10 MR. ORSINGER: The subcommittee was
11 against that.

12 CHAIRMAN BABCOCK: Okay. Well, everybody
13 has seen Dave's letter, I assume, Dave's Bar
14 Association. So if anybody else wants to
15 bring it to the floor, they can; but otherwise
16 not. Okay. Anything more on 9.2?

17 PROFESSOR DORSANEO: No.

18 CHAIRMAN BABCOCK: Okay. Why don't --
19 this would probably be a good place to take a
20 break before we get to finality and FED.

21 PROFESSOR DORSANEO: We had one other
22 thing that we might want to get out of the way
23 which has to do -- maybe you did it while I
24 was gone, the Affidavit of Indigence point.

25 MR. ORSINGER: No.

1 CHAIRMAN BABCOCK: No. We haven't done
2 that.

3 PROFESSOR DORSANEO: And this is, I
4 believe -- I hesitate to make such a
5 statement; but I think this will be a
6 noncontroversial matter.

7 CHAIRMAN BABCOCK: Well, let's talk about
8 it then.

9 PROFESSOR DORSANEO: And I would -- I can
10 do it, or David Peeples can do it. Well, let
11 me do it. When we changed or when the Court
12 changed --

13 HONORABLE DAVID PEEPLES: I will hand you
14 something else.

15 PROFESSOR DORSANEO: When the Court
16 changed the procedure from former Appellate
17 Rule 40 to current Rule 20 of the notification
18 of the court reporter when someone wants to
19 proceed without paying for the record the
20 procedure was changed from notice going to the
21 court reporter or court reporters to the
22 notice going from the person seeking to
23 proceed without payment of costs to the trial
24 court clerk giving notice to the appropriate
25 court reporter.

1 Now David Jackson, a member of this
2 committee has reported that there is a serious
3 problem with the clerks not doing this and
4 making it impossible for court reporters to
5 contest the affidavit of indigence within the
6 appropriate time period. And I may not be
7 making the technical point clear enough.

8 HONORABLE DAVID PEEPLES: Can I just
9 interrupt to explain what I have handed out?

10 PROFESSOR DORSANEO: Sure.

11 HONORABLE DAVID PEEPLES: I copied from
12 the desk copy of the Rules the 1997 version
13 which is the old version and the 2001. Until
14 a recent change if you wanted a free appeal,
15 you had to give a copy of your affidavit of
16 indigency to the court reporter. And somehow
17 that got changed, and we went to a system
18 where you rely upon the clerk to notify the
19 court reporter. And it doesn't get done in a
20 lot of places.

21 Scott McCown wasn't able to be here; but
22 he replied to my e-mail about this and said he
23 strongly agreed that it needed to be changed
24 back so that whoever wants a free appeal just
25 has to make an extra copy of the affidavit and

1 take it to the court reporter; and then if the
2 court reporter wants to contest, there will be
3 a contest. So that's in a nutshell the
4 situation.

5 MR. ORSGINGER: We probably ought to put
6 it in the record that the court reporters
7 don't get compensated for this free record;
8 and so they are the ones that really have a
9 personal financial stake in having to type up
10 a two- or three-week trial with no
11 compensation, and probably, I mean, most
12 assuredly should be given notice of this so
13 they have the opportunity to challenge the
14 legitimacy of the affidavit of indigency.

15 HONORABLE SCOTT A BRISTER: My
16 recollection was that the reason it was
17 dropped was because you don't -- if you're
18 indigent and you didn't give the notice to the
19 court reporter, then you didn't get the
20 appeal. And the problem was that indigents
21 who weren't attorneys, often pro se lose their
22 any chance of any real appeal because they
23 just filed it with the clerk. They did
24 everything else and didn't send a copy to
25 somebody else because they didn't know all 700

1 of the Rules.

2 MR. LATTING: Chip.

3 CHAIRMAN BABCOCK: Yes, Joe.

4 MR. LATTING: I'm not opposed to the
5 general idea of this, and I sympathize with
6 the point of view that David raises in his
7 e-mail to David Peeples; but I'm a little
8 concerned with the wording of this. It's
9 pretty draconian, and it seems to me there is
10 some way we could soften this because it says
11 under the proposal here, if this is the
12 proposal, that if (indicating) --

13 CHAIRMAN BABCOCK: What are you waving up
14 in the air, Joe?

15 MR. LATTING: I'm waving the handout. I
16 believe this came from David Peeples.

17 HONORABLE DAVID PEEPLES: What the Rule
18 used to be.

19 MR. LATTING: What the Rule used to be,
20 it says the court reporter and it says "the
21 appellant or his attorney shall give notice of
22 the filing of the affidavit to the opposing
23 party and his attorney and to the court
24 reporter where the case was tried within two
25 days after the filing. Otherwise he shall not

1 be entitled to prosecute the appeal."

2 That is pretty rough it seems to me; and
3 he could, he or she, this indigent person
4 could be three days late and find out about
5 it, and according to the terms of this Rule
6 cannot prosecute an appeal; and these are the
7 very people who are likely to miss that.

8 PROFESSOR DORSANEO: We don't need that
9 "otherwise." And in fact the "otherwise"
10 once was more congenial to the person who
11 wanted to proceed without providing for the
12 payment of costs. I don't remember what the
13 language was before this version of former
14 Appellate Rule 40; but I don't think the
15 subcommittee thought that that otherwise was a
16 part of this. You just wanted to give notice
17 to the court reporter.

18 MR. ORSINGER: I could offer an
19 intermediate proposal which is that we take
20 the Rule as it exists today and then say that
21 the court reporter shall have 10 days from
22 receipt of the notice of affidavit of
23 indigency to file a contest; and that way no
24 one is cut out of the appeal, but if the clerk
25 doesn't give it to the court reporter, the

1 appellant at some point is going to say "Hey,
2 where is my record?" And the court reporter
3 is going to say "You know, I never received an
4 Affidavit of Indigency." And they say "Well,
5 hear it is." And so then that gives the court
6 reporter another --

7 MR. LATTING: I'm comfortable with that.

8 HONORABLE DAVID PEEPLES: In other words,
9 if the clerk does his or her job, the
10 court reporter has got it and has ten days.
11 And if the clerk doesn't do the right thing
12 and notify the court reporter, the
13 court reporter, the time doesn't start to run
14 on the reporter until he or she gets it.

15 MR. ORSINGER: Yes. But we still need a
16 time limit on filing with the clerk, because
17 at some point they've got to decides if
18 they're going to fish or cut bait. If they're
19 going to take this indigent appeal, they need
20 to tell the clerk within a certain period of
21 time. Maybe two days is not enough time. It
22 just says --

23 HONORABLE DAVID PEEPLES: It says
24 above on the 2001 it says under (c)(1)
25 "Appeals. An appellant must file the

1 affidavit with or before the notice of
2 appeal." That's already the law.

3 MR. ORSGINER: That's either 30 or 90
4 days depending on whether they file a motion
5 for new trial.

6 CHAIRMAN BABCOCK: So are you guys going
7 to come up with some language?

8 MR. ORSINGER: Sure. I'll be happy to.
9 I mean, do we have to do it right now?

10 CHAIRMAN BABCOCK: No.

11 HONORABLE SCOTT A. BRISTER: So the
12 concept is what, Richard?

13 MR. ORSINGER: The concept would be leave
14 the current rule as it is with the duty on the
15 clerk to forward it to the court reporter
16 promptly.

17 HONORABLE SCOTT A. BRISTER: But in a few
18 cases where the clerk messes up?

19 MR. ORSINGER: Then you have another
20 sentence that says "The court reporter shall
21 have X days from receipt of notice of the
22 Affidavit of Indigency to file a contest."

23 HONORABLE SCOTT A. BRISTER: Right. The
24 old Rule was the time for filing your contest
25 ran from when you got notice. The problem is

1 the new Rule runs from when it was filed. So
2 the problem is if the clerk doesn't give the
3 court reporter notice, the court reporter may
4 never know and the ten days runs.

5 So it seems like you could just make it,
6 you know, the 10 days runs from filing except
7 as to the court reporter ten days runs from
8 notice.

9 HONORABLE DAVID PEEPLES: Can I
10 suggest --

11 HONORABLE SCOTT A. BRISTER: Actual
12 receipt.

13 HONORABLE DAVID PEEPLES: -- that maybe
14 we have until tomorrow morning to come up with
15 some language, if that's the sense of the
16 committee?

17 CHAIRMAN BABCOCK: Yes.

18 MR. LATTING: The concept is
19 compassionate conservatism.

20 HONORABLE DAVID PEEPLES: There probably
21 ought to be some language down in (e),
22 Richard, Contest of Affidavit.

23 MR. ORSINGER: Yes.

24 HONORABLE DAVID PEEPLES: That would
25 be better, I think, than trying to draft it

1 right here with 30 people.

2 CHAIRMAN BABCOCK: I agree. Yes, Bonnie.

3 MS. WOLBRUECK: I just have one comment.
4 I think the proposal here is regarding the
5 court reporter having ten days after receipt
6 of the affidavit from the clerk. Then I would
7 assume the clerk has to have proof of filing
8 or giving a copy to the court reporter, or the
9 court reporter has to have proof of receipt of
10 it. Correct?

11 HONORABLE DAVID PEEPLES: I hadn't
12 thought about who would have the burden of
13 showing the court reporter didn't have notice
14 and so forth; but maybe the court reporter
15 ought to have the burden to show that. We can
16 work on that.

17 MR. ORSINGER: That would be provided by
18 the court reporter's sworn testimony, won't
19 it, ordinarily?

20 HONORABLE SCOTT A. BRISTER: Yes. If the
21 court reporter shows up in front of the judge
22 in the hearing ready.

23 CHAIRMAN BABCOCK: Okay. If you guys can
24 work on some language for tomorrow morning,
25 that would be great. So before we go to

1 finality, why don't we -- finality and FED is
2 what we have got left. Then let's take a
3 little break.

4 HONORABLE DAVID PEEPLES: On
5 finality I e-mailed everybody some things. If
6 you didn't get it or if you want a fresh copy,
7 there are some over here behind where I am
8 sitting.

9 CHAIRMAN BABCOCK: All right. Let's take
10 a little break.

11 (Recess 3:22 to 3:45.)

12 CHAIRMAN BABCOCK: All right. Let's go,
13 guys. We're on the home, if not the final,
14 finality stretch. Sarah, did you want to
15 start, or does David want to start? Who wants
16 to go?

17 HONORABLE SARAH B. DUNCAN: I imagine
18 David would like to go first.

19 HONORABLE DAVID PEEPLES: I'll be glad
20 to; but it doesn't matter to me. Do you want
21 me to go first?

22 HONORABLE SARAH B. DUNCAN: It doesn't
23 matter to me.

24 CHAIRMAN BABCOCK: Jump ball.

25 HONORABLE DAVID PEEPLES: Well, just a

1 couple of things by way of introduction,
2 Chip. Number one, there are a couple of
3 things we can do to the present law that would
4 be improvements that wouldn't have adverse
5 effects elsewhere; but I do think that there
6 is some, you know, to deal with the appellate
7 issues that we've been talking about I think
8 would necessarily require having an adverse
9 effect in the trial court. In other words, I
10 don't think on some of the issues it's
11 possible to fix the appellate problems without
12 causing problems in the trial court; and I
13 think we need to keep that in mind.

14 Now as I have looked at this I think
15 there are about four things, routes we could
16 take. And the first would be to not do
17 anything and let the case law stand; and Judge
18 Hecht's opinion in Lehmann in my opinion has
19 helped a good bit.

20 A second and related way to handle it
21 would be to try to summarize and restate the
22 present law in a Rule; and I tried to do that
23 in my Rule 306. And the third thing we could
24 do is what Sarah and I think others are
25 recommending, which is a -- wouldn't you call

1 it the a "Death Certificate," Sarah?

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

4 HONORABLE DAVID PEEPLES: Yes. A
5 Certificate of Appealability or Order of
6 Appealability. And that would fix the
7 appellate problems; but in any opinion would
8 cause what I think would be greater problems
9 in the trial court; but that's a decision
10 we'll have to make.

11 And then what I tried to do in my rewrite
12 of 306(a) was to offer incentives to lawyers
13 to include the Lehmann language by saying "if
14 you don't include it, there's a longer time
15 table; but if you're the winner, include that
16 language and the timetables start right now
17 and don't get extended." And that gives an
18 incentive to the winning lawyers and to judges
19 to include that language. It would put people
20 people on notice because the language would
21 have to be close to the judge's signature, and
22 timetables would be extended if the language
23 was not used. And then in addition, and I
24 think this can be done no matter what we do, I
25 would say we should require that the notice

1 that clerks send out under 306(a) say more
2 than simply in a postcard there's been a final
3 judgment or something like that, in other
4 words, say final appealable, all parties, all
5 issues, and it's appealable and so forth. And
6 then we could go further and say that if
7 somebody doesn't get that notice and can come
8 in and show the trial court that this litigant
9 did not get that notice, you would have more
10 time, which you do under 306(a) as it is.

11 So now my personal view is I'm not really
12 advocating the 306(a) thing. I do think it
13 would be helpful to restate the law; and I
14 think that would advance the ball a little bit
15 because it would tell everybody in a Rule
16 "Here are the principles that govern this
17 area."

18 So I don't -- I am concerned that if we
19 do the death certificate, it would cause
20 problems in the trial courts by keeping cases
21 pending long after everyone thought they were
22 final; and that would mean in divorce cases
23 unenforceability. It would mean the trial
24 courts somebody could come back in and ask the
25 judge to redo the whole thing. The judge

1 would have jurisdiction to do it. It would
2 mean in tax cases if there has been a
3 foreclosure and the judgment that it was based
4 upon was not final, there would be problems.

5 And so I just think that to try to fix
6 the appellate problems that you-all are
7 concerned about by doing that we would cause
8 even worse trial court problems. So that's
9 the reason that I would oppose what you're
10 getting ready to say.

11 CHAIRMAN BABCOCK: David, the thing you
12 e-mailed to us has got a new Rule or an
13 amended Rule 306 and a largely new Rule 306a.
14 And your proposal or your intention is for us
15 to discuss recommending both? It's not an
16 either/or, or is it?

17 HONORABLE DAVID PEEPLES: It could
18 be -- well, I think 306 ought to be on the
19 table because all I tried to do there was to
20 restate what the law is right now, and I added
21 that the Lehmann language has to be put right
22 by the judge's signature.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE DAVID PEEPLES: And then 306a
25 would just you'll give more time if the

1 language is not there, so that somebody who
2 all of a sudden finds out 60, 70, 80 days
3 later that there is a final judgment would
4 have time to take care of it.

5 CHAIRMAN BABCOCK: But we are to read
6 these together. They're not alternatives?

7 HONORABLE DAVID PEEPLES: They're not
8 alternatives. That's correct. 306 is stand
9 alone; and 306a would add to it.

10 CHAIRMAN BABCOCK: All right. Okay.
11 Sarah, have you got reactions, comments,
12 statements?

13 HONORABLE SARAH B. DUNCAN: Yes.

14 CHAIRMAN BABCOCK: I knew somehow.

15 HONORABLE SARAH B. DUNCAN: Somehow you
16 knew this. I'm not opposed, and I don't think
17 any member of the subcommittee is opposed to a
18 Rule that tries to fix discreet problems, if
19 that's what the Committee wants to do. The
20 subcommittee has come to the full committee on
21 several occasions and has asked the committee
22 for direction as to which way they want, the
23 full committee wants us to draft a Rule.

24 I feel fairly safe in speaking for the
25 subcommittee that we're still of that view,

1 that whichever way the full committee wants
2 the Rule to be written we will attempt to
3 draft a Rule.

4 I personally and several members of the
5 subcommittee are still of the view that a
6 piecemeal approach to trying to fix the
7 problems involved in finality of judgments is
8 at best exceedingly difficult, at worst
9 impossible. As a for instance, while there
10 are many things in David's proposed Rule that
11 I think members of the subcommittee would
12 agree to like following a conventional trial
13 on the merits we're going to presume it's
14 final hasn't caused a lot of problems. So why
15 not continue it?" I think most people would
16 agree that that's true.

17 At the same time I also think most people
18 would agree that one of the more serious
19 problems we have is with serial orders, and
20 that it's very difficult even for the people
21 that drafted the pleadings to know necessarily
22 when the last order disposes of the last party
23 or the last claim so that all of the previous
24 orders now merge and become a final appealable
25 judgment.

1 The one real opposition I have, and David
2 and I talked about this the other night, is
3 extending the appellate timetable 90 days if
4 there is no magic language included in a final
5 judgment or order. I just don't see that --
6 you know, we're talking about creating
7 problems in the trial court. To me extending
8 the appellate timetable for three months
9 because there is no magic language immediately
10 above or adjacent to the judge's signature is
11 to create some real finality problems in most
12 cases because most cases aren't appealed.

13 That said, I've given people copies of
14 the subcommittee's Order of Appealability.
15 There is one modification to it in line with
16 our last meeting that says "If any party
17 believes that an Order of Appealability has
18 been erroneously entered, then it's that
19 party's responsibility to object."

20 I would note that the Order of
21 Appealability that we came up with in response
22 to the full Committee's request as Richard
23 Orsinger suggests uncouples finality and
24 appealability. It simply states that "Here's
25 a piece of paper that is going to start the

1 timetable, appellate timetable in this case."

2 And I think, you know, what we were asked
3 to do at the last meeting, and I have the
4 transcript if anybody wants to read it, is
5 Judge Peeples was asked to come up with a
6 tweaking rule, and the subcommittee was asked
7 to make any changes to the Order of
8 Appealability; but I couldn't find any votes
9 for changing the Order of Appealability one way
10 or the other, so it's basically unchanged.

11 But we're still at the same point; and
12 that is how are we going to approach and
13 resolve the question of finality of judgments,
14 or do we choose to do nothing about it?

15 CHAIRMAN BABCOCK: Okay. Sarah, your
16 subcommittee is Judge Cayce, Duggins, Hall,
17 Hatchell, Gilstrap and Tipps; is that right?

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

20 CHAIRMAN BABCOCK: Most of whom are
21 here. Have you-all had a chance to look at
22 the Order of Appealability and Judge Peeples'
23 proposed order, the subcommittee. Proposed
24 Rules, I mean. Not order. And if so, what do
25 you think? Judge Cayce, what is your take?

1 HONORABLE JOHN CAYCE: This is the first
2 time I've really seen it.

3 CHAIRMAN BABCOCK: You just got it?

4 HONORABLE SARAH B. DUNCAN: He e-mailed
5 it.

6 HONORABLE JOHN CAYCE: It might have come
7 a long time ago.

8 HONORABLE SARAH B. DUNCAN: It was
9 e-mailed, yes; but it's been months.

10 HONORABLE JOHN CAYCE: Yes. That's what
11 I thought.

12 CHAIRMAN BABCOCK: Ralph, do you have any
13 reaction?

14 MR. DUGGINS: Well, I go back and forth
15 on it. I just it would be nice if there were
16 a way to have just one Rule and know it would
17 always work. I still am undecided on it. I
18 know that's no help.

19 CHAIRMAN BABCOCK: Mike, what are your
20 thoughts?

21 MR. HATCHELL: At first I was on the
22 fence about the Order of Appealability; and I
23 think the more that I lived with it the more
24 comfortable I became with it, and I thought
25 that it was a good solution. Frankly, I mean,

1 judges can learn to enter judgments. So why
2 can't they learn to enter these orders? I
3 don't understand or appreciate quite the
4 problem with the gap between judgment and
5 order that keeps everything open for decades.

6 MR. MEADOWS: Mike, we can't hear down
7 here.

8 MR. HATCHELL: Well, I was just saying I
9 didn't understand the disconnect between a
10 judge rendering a final judgment and then
11 somehow or another because of the absence of
12 the Order of Appealability it doesn't ever
13 become final.

14 Judges have learned to enter judgments;
15 and I don't understand why they can't learn to
16 enter these orders. It seems to me like it's
17 up to them because they're all legitimately
18 concerned about statistics that they would
19 want to make these as final as possible; but
20 I'm very open-minded about this.

21 CHAIRMAN BABCOCK: Frank Gilstrap, what
22 do you think?

23 MR. GILSTRAP: I too have gone both
24 ways. I don't believe that to my mind there
25 has been a good answer to the finality

1 problem. I just, you know, we had Richard
2 Orsinger come forward with the issues on
3 divorce. We got the Rule -- is it 53 or 58
4 from the federal courts where if they have
5 that problem?

6 I myself have gone back in and opened a
7 judgment up everybody thought was final; and
8 while it would be nice if all the judges did
9 it, they ain't going to do it. And I think
10 when you balance it out I don't think -- I
11 think you've got to choose between one or the
12 other. And I think I come down on the side of
13 I think we need to go with Judge Peeples.

14 HONORABLE JOHN CAYCE: If I might just
15 throw something in, the concern I would have
16 about the Order of Appealability is that, at
17 least from my point of view, it doesn't solve
18 much of the problem that we, at least that I
19 perceive we're trying to solve here; and that
20 is that it would allow for the appeal of
21 orders or judgments that on further review are
22 not final, which is a problem for us.

23 And I like Judge Peeples' Rule because it
24 tries to address that issue a little bit more
25 comprehensively. And it might help us

1 conserve some of the resources that we devote
2 to reviewing docketing, processing and
3 judgments and order that ultimately we
4 determine are not final. So that's...

5 CHAIRMAN BABCOCK: Stephen Tipps.

6 MR. TIPPS: I apologize. I really
7 haven't had a chance to study Judge Peeples'
8 memorandum, and I missed the last meeting, so
9 I'm without much to contribute at this point.

10 CHAIRMAN BABCOCK: Okay.

11 MR. MEADOWS: I like what Mike says from
12 the perspective of some of our courts want to
13 conclude cases. In fact we've gone to systems
14 where we say a case has to be concluded. If
15 it's this type of case, you've got to be able
16 to finish it six months, nine months,
17 whatever; and we're trying to get people to
18 stick to that.

19 I worry about automatic delays, another
20 three months, especially if you're looking at
21 clearance rates and you're looking at some of
22 those demands. So I just have a concern with
23 more delay; and I see exactly what Judge
24 Peeples is wanting to do is motivate the
25 attorneys. Maybe we can come up with another

1 way of motivating them.

2 I'm just worried about another
3 three-month extension automatically and
4 possibly a six-month extension automatically
5 in a case that maybe should have been done in
6 six months and now it's a year. And there
7 ought to be something else we can do. Maybe
8 automatic extension. I'm concerned about
9 that. I like the idea of what you're doing.
10 I'm just worrying about the time.

11 CHAIRMAN BABCOCK: Bill.

12 PROFESSOR DORSANEO: When I read the
13 proposal for Rule 306 I don't find anything
14 that I disagree with immediately.

15 CHAIRMAN BABCOCK: Are you talking about
16 Judge Peeples"?

17 PROFESSOR DORSANEO: Yes, Judge Peeples'.
18 I'm puzzled by the statement in 3, "A judgment
19 or order rendered without a conventional trial
20 on the merits is final only if." I wonder why
21 that says "only if" rather than just "if."

22 And the point that I'm making may be
23 connected up with this 90 additional day
24 matter. At least in my mind if it's not final
25 because it doesn't satisfy (c), for example,

1 then no clocks have started. And I think
2 that's the matter we need to kind of come to
3 grips with. That would be all right with me
4 if it didn't -- if we didn't try to completely
5 solve that conundrum and just say that it is
6 final, okay, and maybe is final in the trial
7 court and appealable if.

8 HONORABLE DAVID PEEPLES: Take out
9 the "only"?

10 PROFESSOR DORSANEO: Take out the
11 "only." And that would at least provide
12 lawyers with a lot more information than they
13 have now, although it doesn't solve the
14 hardest problem. What if the judge doesn't
15 put the Lehmann language in there and it's not
16 a conventional trial situation? And I guess
17 those are more likely to be the types of cases
18 we'd be dealing with than not as distinguished
19 from the 400 Southwest 2nd Aldridge time
20 period in our jurisprudential history.

21 But bottom line if it can be clarified a
22 little bit to solve this conundrum, it would
23 be an improvement. And I don't have anything
24 really to disagree with it. I don't think it
25 maybe goes far enough in a perfect word; but

1 it makes things a lot clearer for lawyers.

2 Now I will repeat until somebody puts a
3 tennis ball to my mouth, I guess, that I don't
4 like a Mother Hubbard clause that says "All
5 relief not expressly granted by prior written
6 order or judgment is denied." I don't like
7 that because I think that is what gets us and
8 has gotten us into trouble.

9 People put that in when they don't
10 understand what it means or when they don't
11 really mean it. And whether we have an order
12 of appealability or a certificate of
13 appealability or some other kind of thing I
14 think Judge Calvert, you know, might say, and
15 we can't ask him; but he might say that that
16 part of the Aldridge opinion would have been
17 better left unstated. That was just too
18 simple, and it's turned out to be a real
19 troublemaker.

20 Justice Hecht doesn't put that language
21 in the Leymann opinion presumeably --

22 CHAIRMAN BABCOCK: He's too savvy for
23 that.

24 PROFESSOR DORSANEO: -- not because he
25 didn't think about it, but because he's too

1 savvy to fall into that same trap.

2 JUSTICE NATHAN HECHT: It's a wise man
3 that lets the snake bite the other fellow.

4 PROFESSOR DORSANEO: Now, you know, if
5 you're going to say the "only if," David, in
6 here, if we're going to leave it "only if,"
7 then I don't think you can have it both ways.
8 It's just not final, and it's not appealable,
9 and the trial court doesn't lose jurisdiction,
10 and it just sits there until somebody fixes
11 it. And maybe that's not a good thing.
12 Right? Maybe that's not a good thing.

13 HONORABLE DAVID PEEPLES: But if it
14 doesn't dispose of the whole case, why
15 shouldn't it keep sitting there?

16 PROFESSOR DORSANEO: Well, maybe Lehmann
17 is unclear to me. I think that this when this
18 says it's appealable that's what it means. It
19 does dispose of the whole case for purposes of
20 making it appealable.

21 CHAIRMAN BABCOCK: Justice Hecht had a
22 comment for us?

23 PROFESSOR DORSANEO: These are
24 alternatives?

25 JUSTICE NATHAN HECHT: Well, it would

1 only be a problem if (a) and (b) didn't apply;
2 and in the vast number of cases (a) and (b)
3 applies.

4 PROFESSOR DORSANEO: Uh-huh (yes).

5 HONORABLE NATHAN HECHT: (c) really, while
6 it comes up in a lot of cases, --

7 PROFESSOR DORSANEO: I see.

8 JUSTICE NATHAN HECHT: -- they are still
9 the vast minority of cases. Ordinarily it's a
10 suit between two people and there's a
11 judgment. It dismisses it or takes nothing or
12 whatever, and that's the end of it.

13 HONORABLE DAVID PEEPLES: The "or" on
14 line 12, Bill, I think --

15 PROFESSOR DORSANEO: I see. Yes.

16 HONORABLE DAVID PEEPLES: -- is
17 important.

18 PROFESSOR DORSANEO: I didn't read it
19 carefully enough to see. But (a), (b) or
20 (c).

21 CHAIRMAN BABCOCK: Justice Duncan.

22 HONORABLE SARAH B. DUNCAN: I have a
23 couple of questions for Judge Peeples. What
24 is -- let's say that we propose this Rule to
25 the Supreme Court and the court Adopted it.

1 What is the effect of a Mother Hubbard clause
2 after this ruling?

3 HONORABLE DAVID PEEPLES: An old Mother
4 Husband clause?

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

6 HONORABLE DAVID PEEPLES: I think under
7 Lehmann it doesn't do anything, does it?

8 HONORABLE SARAH B. DUNCAN: It expresses
9 disposes of all claims.

10 HONORABLE SCOTT A. BRISTER: You mean
11 expressly disposes all claims to be something
12 more than a Hubbard clause. You mean it has
13 to name the parties and name the claims?

14 MR. ORSINGER: No. David is saying that
15 it says, you know, their claim under the
16 Deceptive Trade Practice Act is zeroed out,
17 and their claim for negligence is \$50,000.
18 Isn't that right, David?

19 HONORABLE DAVID PEEPLES: Yes.

20 PROFESSOR DORSANEO: He means
21 specifically an expression.

22 MR. ORSINGER: He doesn't mean an
23 explicit Mother Hubbard clause. That's not
24 what (a) is.

25 HONORABLE DAVID PEEPLES: I do not mean

1 for line ten to be accomplished by an old
2 fashioned Mother Hubbard clause.

3 PROFESSOR ALBRIGHT: But a Mother Hubbard
4 does expressly dispose.

5 MR. GILSTRAP: With unmistakable clarity.
6 That's what Lehmann teaches us.

7 JUSTICE NATHAN HECHT: We picked another
8 word in Lehmann; and I don't know what it
9 was.

10 MR. GILSTRAP: They used a different
11 phrase.

12 JUSTICE NATHAN HECHT: "Actually" or
13 "specifically" or something.

14 PROFESSOR DORSANEO: It's "unmistakeable
15 clarity."

16 MR. GILSTRAP: It says this: Lehmann
17 says "This judgment finally disposes of all
18 parties and all claims and is appealable."

19 MR. ORSINGER: What if you said
20 "Exclusively disposes of each claim between
21 all parties"?

22 HONORABLE SARAH B. DUNCAN: If it
23 disposes of all claims, it disposes of each
24 party.

25 PROFESSOR DORSANEO: What you mean is

1 "specifically." Not "expressly."

2 HONORABLE DAVID PEEPLES: That's what I
3 mean. "Specifically" instead of "expressly"?

4 MR. ORSINGER: How about "specifically in
5 each"?

6 HONORABLE SARAH B. DUNCAN: The other
7 question I have is if I have a notice of
8 nonsuit of one party, one defendant in a
9 three-defendant case, and I then get a summary
10 judgment against or a default judgment against
11 the other two parties, I assume that that is
12 interlocutory unless I include the (c)
13 "unmistakable clarity" language.

14 MR. ORSINGER: Why?

15 HONORABLE SARAH B. DUNCAN: Because I
16 don't have an order of nonsuit.

17 MR. DUGGINS: Because you don't have an
18 order of what?

19 HONORABLE SARAH B. DUNCAN: Order of
20 nonsuit.

21 PROFESSOR DORSANEO: Unless you would
22 just gloss it and say that an order is
23 implied, which I wouldn't like to do.

24 HONORABLE SARAH B. DUNCAN: That is why
25 I'm asking the question.

1 HONORABLE DAVID PEEPLES: Isn't your
2 question whether the notice of nonsuit gets
3 the job done without an order?

4 MR. ORSINGER: Uh-huh (yes).

5 HONORABLE SARAH B. DUNCAN: A notice of
6 nonsuit coupled with "unmistakable clarity"
7 language.

8 HONORABLE DAVID PEEPLES: Okay. There is
9 a nonsuit against A; but there's not an order,
10 default judgments as to B and C, and those are
11 the only three parties and claims.

12 HONORABLE SARAH B. DUNCAN: Yes.

13 HONORABLE DAVID PEEPLES: If the nonsuit
14 is not effective without an order of nonsuit,
15 I think that's still interlocutory.

16 HONORABLE SARAH B. DUNCAN: Even if I
17 included (c) language?

18 HONORABLE SCOTT A. BRISTER: What if the
19 petition, if you merely filed an amended
20 petition to drop one defendant?

21 CHAIRMAN BABCOCK: That one, the
22 nonsuited?

23 HONORABLE SCOTT A. BRISTER: No. You
24 never moved for a nonsuit. You never moved or
25 filed a notice of nonsuit. But the law is

1 clear if you move, if you file your amended
2 petition and one defendant is not listed,
3 unless you do the things to establish that it
4 was a mistake, that was the nonsuit without an
5 order.

6 HONORABLE DAVID PEEPLES: Under present
7 law doesn't that make it final as of the date
8 of the latest order --

9 MR. ORSINGER: Yes.

10 HONORABLE DAVID PEEPLES: -- of default
11 judgment?

12 HONORABLE SCOTT A. BRISTER: It would
13 fall --

14 MR. ORSINGER: It measures the judgment
15 against the live pleadings.

16 PROFESSOR CARLSON: The day you file the
17 pleading?

18 MR. ORSINGER: He filed a pleading,
19 so you measure the judgment against the live
20 pleadings. If the party is not on the
21 pleading, the party is not in the case.

22 PROFESSOR CARLSON: The day of filing the
23 pleading would be the day of the final
24 judgment.

25 HONORABLE DAVID PEEPLES: Let me just say

1 that I think the case that you-all are stating
2 here is not clearly dealt with here. It sort
3 of falls into (b), line 11; but it's not
4 clear. Maybe it needs to be taken care of.

5 (Pager sounds.)

6 CHAIRMAN BABCOCK: Easy for you to say.
7 How do we fix that?

8 MR. ORSINGER: Are we trying to fix a
9 nonsuit? Because we can fix a nonsuit by just
10 saying that if you don't get your order
11 granted, then you don't have a nonsuit.

12 CHAIRMAN BABCOCK: That's the logic.

13 MR. ORSINGER: I know. So I don't think
14 that that is unfair. I mean, people need to
15 understand that they haven't finished
16 nonsuiting until they get an order signed.

17 CHAIRMAN BABCOCK: Right.

18 MR. ORSINGER: To me that nonsuit, a
19 person who nonsuits without getting an order
20 is going to be such a peculiar situation that
21 we shouldn't allow that circumstance to
22 control the way we write the Rule.

23 HONORABLE SARAH B. DUNCAN: I think it's
24 actually a pretty quick one. Even in this
25 committee I don't think most people knew that

1 if you don't get an order or a lot of people
2 didn't know that if you don't get an order and
3 you follow it with something that isn't a
4 conventional trial on the merits, that you
5 don't have a final judgment.

6 MR. ORSINGER: Well, are you proposing
7 that we would somehow have a final judgment
8 without an order of nonsuit?

9 HONORABLE SARAH B. DUNCAN: I'm not
10 proposing either way. I'm trying to
11 understand.

12 MR. GILSTRAP: I think you would solve
13 that with (c), because you would have -- you
14 could have language that states with
15 unmistakable clarity and language placed
16 immediately above the signature that it's
17 final as to all claims between all parties.
18 That would dispose of the person who was
19 nonsuited but there was no order signed. The
20 language could be the language out of
21 Lehmann: "This judgment finally disposes of
22 all parties and all claims and is appealable."

23 MR. ORSINGER: But what you've just done,
24 Frank, is you converted the nonsuit into a
25 binding res judicata bar adjudication --

1 MR. GILSTRAP: I don't know --

2 MR. ORSINGER: -- which if you're dumb
3 enough to do that, I guess --

4 MR. GILSTRAP: No.

5 MR. ORSINGER: -- maybe that's the price
6 you pay.

7 MR. GILSTRAP: It says it disposes of
8 all. A Mother Hubbard clause says "All relief
9 not expressly granted is denied."

10 MR. ORSINGER: Which means that this
11 plaintiff -- this defendant that you dropped
12 out now all of a sudden has been --

13 MR. GILSTRAP: That's right.

14 MR. ORSINGER: -- exonerated rather than
15 just dropped.

16 MR. GILSTRAP: That's right. But with
17 the language from Lehmann it just says "This
18 judgment finally disposes of all parties and
19 claims." It doesn't say how it's disposed
20 of.

21 MR. ORSINGER: So it might absorb the
22 nonsuit and make it an order?

23 CHAIRMAN BABCOCK: No. What he's saying
24 is that would be the order of nonsuit.

25 MR. GILSTRAP: That makes it final.

1 MR. ORSINGER: The ones that I see say
2 "All other requested relief not granted is
3 denied" in which event I'm not sure that that
4 is an order of nonsuit.

5 MR. GILSTRAP: Under Lehmann that is no
6 good anymore.

7 MR. ORSINGER: Okay.

8 HONORABLE SARAH B. DUNCAN: I guess I'm
9 having Richard Orsinger's disease.

10 MR. ORSINGER: Let's call it a syndrome.

11 HONORABLE SARAH B. DUNCAN: And I was
12 going to also say the Dorsaneo disease. I'm
13 having trouble understanding the coupling of
14 finality with appealability in (c). (c)
15 doesn't adjudicate.

16 I mean, I understand Mother Hubbard. It
17 is a disposition of something, "All relief
18 requested that is not granted is denied."
19 There is a disposition, an adjudication. (c)
20 there's no adjudication at all; and yet we're
21 saying it's a final appealable judgment. And
22 I guess I'm the only one for which that has
23 cognitive dissonance?

24 HONORABLE DAVID PEEPLES: Did the Lehmann
25 case not basically say that the language

1 that's in (c) has the same effect as Mother
2 Hubbard language?

3 JUSTICE NATHAN HECHT: Yes.

4 HONORABLE DAVID PEEPLES: It does say
5 that?

6 JUSTICE NATHAN HECHT: Well, the effect
7 of the old Mother Hubbard has been given
8 erroneously.

9 HONORABLE DAVID PEEPLES: Yes. So in
10 other words, this (c) does in effect
11 adjudicate claims that are not expressly dealt
12 with?

13 JUSTICE NATHAN HECHT: Well, you can
14 argue about adjudicating. It gets rid of it.

15 PROFESSOR DORSANEO: For appeal purposes
16 and for trial court plenary power purposes.

17 JUSTICE NATHAN HECHT: Right.

18 MR. ORSGINGER: And when you say "gets
19 rid of" does that mean it's denying or
20 granting it?

21 JUSTICE NATHAN HECHT: Well, I don't think
22 the opinion goes into that.

23 PROFESSOR DORSANEO: The opinion let's
24 the law of res judicata take care of that;
25 however it might.

1 JUSTICE NATHAN HECHT: Right.

2 PROFESSOR DORSANEO: Which is a good
3 solution.

4 MR. ORSINGER: You have to look somewhere
5 else than this language to find out how your
6 claims were disposed of is what Sarah is
7 saying. This doesn't tell you how the claims
8 are disposed of. It just tells you they are
9 disposed of. You have to look somewhere else
10 to figure out how they were disposed of.

11 HONORABLE SARAH B. DUNCAN: I don't think
12 it tells you that they are disposed of; but I
13 guess I'm the only one with this problem.

14 CHAIRMAN BABCOCK: Well, let's say you
15 have got Plaintiff Jones who has got an
16 affirmative claim for relief against Defendant
17 Smith, and then you've got a bunch of other
18 parties. There's nothing ever been done to
19 that claim. This language goes into a final
20 judgment. Jones has never gone to trial and
21 never got a summary judgment, never gotten
22 that affirmative relief, but does an appeal.
23 Then he files a new lawsuit against Smith.
24 What would res judicata say about what
25 happened under this Rule?

1 HONORABLE SARAH B. DUNCAN: Res judicata
2 arises from the same traction.

3 MR. ORSINGER: It would probably say
4 since you failed to get any relief in your
5 favor in the first proceeding you can't come
6 back and try to get --

7 HONORABLE SCOTT A. BRISTER: What was or
8 could have been litigated.

9 CHAIRMAN BABCOCK: Right. So --

10 MR. ORSINGER: So it's inferentially a
11 denial of anything.

12 CHAIRMAN BABCOCK: Right.

13 PROFESSOR DORSANEO: But it's a lot more
14 complicated than that because there are
15 exceptions and all kinds of other things that
16 we can't possibly, you know, write into this.
17 It's just not a good idea to say we might as
18 well deny because that's what res judicata
19 would do, because it might or it might not.
20 Probably would mostly, but not necessarily.

21 And I think last time I raised the issue,
22 well, suppose the case gets reversed and
23 remanded and nobody said anything all along?
24 Well, it's back for whatever at that point.
25 It just seems to me it's okay to let the law

1 of res judicata deal with that even though
2 we're not exactly sure in a given case what
3 that is going to mean.

4 HONORABLE SARAH B. DUNCAN: I guess
5 that's sort of my question is -- and you
6 remember, Richard, talking about uncoupling --

7 MR. ORSINGER: Yes.

8 HONORABLE SARAH B. DUNCAN: -- finality
9 and appealability? And I thought what our
10 concern was was appealability, not finality;
11 and it's very troubling to me that to try to
12 solve the problem of appealability we're
13 messing with finality.

14 PROFESSOR DORSANEO: What do you mean by
15 "finality" when you're using it? You don't
16 mean --

17 MR. ORSINGER: The trial court uses --

18 PROFESSOR DORSANEO -- res judicata
19 finality. You mean trial court plenary power
20 finality?

21 MR. ORSINGER: Plenary power.

22 HONORABLE SARAH B. DUNCAN: Well, I'm
23 talking about both actually. I'm talking
24 about I think it was Mike Hatchell that talked
25 about we're going to say that this is a final

1 judgment even though we've never adjudicated
2 nine tenths of the claims in the lawsuit.

3 HONORABLE DAVID PEEPLES: Now the judge
4 has signed. The signature line is immediately
5 next to this language. The judge is in effect
6 saying "This case is over. Everything has
7 been done that I'm going to do."

8 And I think the reality is that you get a
9 case where there might be ten causes of action
10 pleaded; but only the first two are they
11 really serious about. The rest of them ar
12 just there, and ultimately they're going to
13 fall out; and the real summary judgment, let's
14 say, would be about the first two, and they
15 didn't even talk about the others. This (c)
16 takes care of those and says they're not in
17 the case anymore.

18 I mean, that's a very common situation,
19 and it seems to me very unrealistic to expect
20 everybody to go through the pleadings and
21 identify them all and take them one, two,
22 three, four, five through ten and deal with
23 them. I mean, you can do that.

24 But I'll tell you there are some
25 pleadings out there in which it's not cause of

1 action one through ten. There are two or
2 three of them kind of buried in one paragraph,
3 and you read it and you think, gosh, are they
4 talking about one or two or three causes of
5 action? And if you can't have some mop-up
6 language like this, it will never get
7 adjudicated.

8 HONORABLE SARAH B. DUNCAN: But I think
9 we're talking about two different things. I'm
10 not suggesting that you not have mop-up
11 language. What I'm suggesting is that if you
12 have mop-up language, it ought to mop up. It
13 ought to adjudicate. And this is exactly
14 where Bill --

15 PROFESSOR DORSANEO: That' where we
16 disagree.

17 HONORABLE SARAH B. DUNCAN: -- doesn't
18 want. Yes. We fundamentally disagree.

19 HONORABLE DAVID PEEPLES: Sarah, would you
20 say that we ought to add some old Mother
21 Husband type language to (c) so that it does
22 expressly deny all claims that aren't
23 expressly -- deny whatever is not expressly
24 granted?

25 HONORABLE SARAH B. DUNCAN: I can imagine

1 a situation where you deny relief on the two
2 claims the plaintiff really believes they have
3 a shot at and don't adjudicate all the other
4 claims, and the appellate court reverses and
5 remands the cause, and all of those claims are
6 now reinvigorated with life. And it seems to
7 me that those ought to get denied, and it goes
8 up on appeal, and the Court of Appeals remands
9 as to the only claims that the plaintiff cared
10 about to begin with; but that's exactly what
11 Bill doesn't want.

12 I just I don't understand; and this is
13 maybe my lack of ability to think about this
14 in the way that we are now thinking about it.
15 I don't understand a judgment that doesn't at
16 least purport to adjudicate all of the pending
17 claims between all of the parties in the
18 lawsuit.

19 JUSTICE NATHAN HECHT: Well, but it might
20 just dismiss them.

21 HONORABLE SARAH B. DUNCAN: It might.

22 JUSTICE NATHAN HECHT: Just dismiss
23 them.

24 HONORABLE SARAH B. DUNCAN: And that
25 concerns me.

1 JUSTICE NATHAN HECHT: I mean a DWP
2 doesn't adjudicate the claim. It just says
3 you're gone.

4 CHAIRMAN BABCOCK: See you.

5 JUSTICE NATHAN HECHT: So it seems to me
6 it couldn't dispose of them in some way other
7 than by denying them on the merits

8 HONORABLE SARAH B. DUNCAN: Right. Yes.
9 I'm not disagreeing with that at all. It's
10 just that we're not adjudicating them that
11 bothers me, not what the particular
12 adjudication is.

13 PROFESSOR DORSANEO: Really the Aldridge
14 presumption after the conventional trial
15 doesn't dispose of them. They were just kind
16 of hanging out there; but --

17 JUSTICE NATHAN HECHT: Really it assumes
18 that they've been abandoned.

19 PROFESSOR DORSANEO: It does.

20 JUSTICE NATHAN HECHT: The whole idea
21 behind Aldridge is if you went to trial and
22 you didn't say anything and you didn't get a
23 verdict and you didn't put it in a judgment,
24 you gave up at some point and just never did
25 say so.

1 PROFESSOR DORSANEO: I think it leaves
2 them to res judicata.

3 JUSTICE NATHAN HECHT: Hold up your hand
4 and say "I give up on this."

5 CHAIRMAN BABCOCK: Sarah.

6 HONORABLE SARAH B. DUNCAN: Under the
7 Aldridge presumption after a conventional
8 trial on the merits is a conclusive
9 presumption?

10 PROFESSOR DORSANEO: It's only for appeal
11 purposes.

12 HONORABLE SARAH B. DUNCAN: Right.

13 MR. ORSINGER: Well, you say only for
14 appeal purposes; but appeal is inextricably
15 intertwined with finality for all purposes
16 including enforceability and plenary power.

17 And plenary power is what I'm really
18 concerned about. I feel like this appellate
19 issue is an esoteric issue between rich
20 clients with multi parties and lawyers that
21 don't do what they're paid to do, and that in
22 order to solve that problem for that small
23 number of people we're creating potential
24 nightmares for the bulk of people who come
25 into court and get an inartfully worded

1 judgment or don't have their little magic
2 passport to finality. And so --

3 CHAIRMAN BABCOCK: "The passport to
4 finality."

5 MR. ORSINGER: The magic passport to find
6 out --

7 HONORABLE SARAH B. DUNCAN: If I could
8 just point out --

9 MR. ORSINGER: Which is your certificate
10 of death.

11 CHAIRMAN BABCOCK: It sounds opaque to
12 me.

13 HONORABLE SARAH B. DUNCAN: There is
14 nothing in the order of appealability that has
15 anything to do with finality.

16 MR. ORSINGER: Well, I believe that we
17 should uncouple finality from the trial court
18 standpoint from appealability because there is
19 less harm to the people of Texas to say that
20 their case gets appealed after five years than
21 to say you don't have a judgment after five
22 years. If you tell them they don't have a
23 judgment after five years, we have got
24 illegitimate children, we've got putative
25 spouses and splitting divorce estates three or

1 four different ways. I can't even tell you
2 the nightmares that that would cause.

3 HONORABLE SARAH B. DUNCAN: Nothing in
4 this deprives any judgment of finality. It
5 simply says today is the day you can start the
6 appellate process.

7 PROFESSOR DORSANEO: Well, you're talking
8 at cross purposes, though, because David
9 Peeples' properly read with glasses on with
10 the "or" makes it final for appeal purposes
11 and for plenary power purposes as I'm
12 understanding it.

13 MR. ORSINGER: But it's only without a
14 conventional trial. In other words, David's
15 3, paragraph 3 on line 8 occurs only if you
16 don't have a conventional trial. If you have
17 a conventional trial, you're under paragraph
18 2. Right?

19 PROFESSOR DORSANEO: I end up agreeing
20 with you that Aldridge probably means for
21 plenary power purposes too, although it
22 doesn't address that question in quoted
23 language.

24 MR. ORSINGER: Well, that was the whole
25 reason that you had it was, you know, because

1 people wouldn't have that finality, and then
2 all of a sudden the appeal would get dismissed
3 because it was interlocutory; and Justice Pope
4 or whoever wrote that said "Come on, guys.
5 We've been telling you over and over again you
6 need to put this into your judgments." That's
7 makes them appealable; but it also makes them
8 enforceable. It also makes them not subject
9 to being set aside on new trial.

10 PROFESSOR DORSANEO: There are lots of
11 different ways to look at this historical
12 development. But the way I read Aldridge it
13 frankly was just Calvert's suggestion, Chief
14 Justice Calvert's suggestion that all of these
15 problems could be bypassed by adding language
16 that doesn't bypass the problems without
17 creating enormously larger problems.

18 I don't think he was saying that this is
19 better to add this language than to go with
20 the presumption. I don't know. We could read
21 it over and over again. I think Mike asked
22 him one time and he wouldn't tell us.

23 MR. HATCHELL: No. What he told me was,
24 he said, "If you ever figure that out, please
25 let me know."

1 MR. ORSINGER: But it seems to me that
2 Aldridge works okay after a conventional trial
3 on the merits; and where it's really having
4 dysfunction is in summary judgments that
5 ill-advisedly contain a Mother Hubbard clause
6 that doesn't apply. Isn't that really the
7 problem?

8 CHAIRMAN BABCOCK: Sarah.

9 HONORABLE SARAH B. DUNCAN: I have
10 another question. Let's say there are one
11 plaintiff, one claim against each of three
12 defendants. The trial court renders summary
13 judgment against defendants one and two on
14 that claim, makes no disposition of
15 plaintiff's claim against defendant three, but
16 includes (c) in his or her order. Defendant
17 three appeals and says "Trial court says it's
18 final as to all claims and all parties, but
19 it's not because the claim against me" -- or
20 the plaintiff appeals -- "my claim against
21 defendant three was never adjudicated."

22 Do we reverse the judgment because the
23 trial judge was wrong in assessing disposition
24 of all claims and all parties? Do we -- I
25 guess that's what we do.

1 HONORABLE SCOTT A. BRISTER: Sure.

2 HONORABLE DAVID PEEPLES: What else would
3 you do? There's been a judgment against
4 defendant three which was improper. The
5 plaintiff timely appealed.

6 HONORABLE SARAH B. DUNCAN: Well, there
7 hadn't been a judgment against defendant
8 three.

9 HONORABLE DAVID PEEPLES: I thought you
10 said that (c) was --

11 MR. ORSINGER: Through the catchall
12 clause relief against three was dismissed.
13 Denied. Pardon me. Denied.

14 HONORABLE JAN P. PATTERSON: Or it was
15 not addressed.

16 PROFESSOR DORSANEO: Or it may be
17 dismissed.

18 HONORABLE SCOTT A. BRISTER: That's what
19 her problem is.

20 HONORABLE DAVID PEEPLES: The language --

21 HONORABLE SARAH B. DUNCAN: That's what
22 my problem is.

23 HONORABLE DAVID PEEPLES: The language in
24 (c) is in the judgment which as I understand
25 the law now has the effect that a Mother

1 Hubbard clause used to have under the Mafrige
2 case which adjudicates the claim against three
3 improperly, but it did. But this person has
4 timely appealed. Why don't you reverse and
5 give him his day in court?

6 CHAIRMAN BABCOCK: Well, but three was
7 basically under this scenario the winner,
8 because there was never any --

9 HONORABLE SARAH B. DUNCAN: I misstated.
10 The plaintiff appealed.

11 HONORABLE DAVID PEEPLES: She changed
12 it. The plaintiff appealed.

13 CHAIRMAN BABCOCK: Okay. I'm sorry. I'm
14 following this. I am.

15 MR. ORSINGER: I don't think that we were
16 ever concerned about that scenario. All the
17 concerns I have heard was when people did not
18 realize that their claims had been adjudicated
19 and didn't timely appeal and lost the right to
20 appeal; and we were trying to protect those
21 lawyers who don't practice law at a minimum
22 level by rewriting the Rules of Procedure to
23 protect them against their own inadequacies.
24 That's was the way I see it.

25 HONORABLE SARAH B. DUNCAN: My question

1 is what do I reverse? I don't have an order
2 to reverse.

3 MR. ORSINGER: Sure you do. You have a
4 summary judgment order that has resolved
5 all --

6 HONORABLE SARAH B. DUNCAN: Well, I
7 assume the plaintiff doesn't want me to
8 reverse that summary judgment order. They
9 just want me to take that one sentence out.
10 They want their summary judgment order against
11 defendants one and two.

12 HONORABLE DAVID PEEPLES: I thought the
13 defendants got the summary judgment against
14 the plaintiff.

15 MR. ORSINGER: I did too.

16 HONORABLE SARAH B. DUNCAN: Well, yes,
17 whichever.

18 MR. ORSINGER: Defendants one and two
19 filed motions for summary judgment that got
20 granted; but defendant three got stuck in
21 there and got the credit for a summary
22 judgment they didn't deserve. So now the
23 plaintiff is upset, so it's appealing one and
24 two; but it's also appealing three.

25 HONORABLE SARAH B. DUNCAN: Well, what if

1 the plaintiff knows that the summary
2 judgements Defendants one and two got is just
3 fine, it's correct? They don't want -- the
4 plaintiff doesn't want the judgment reversed.

5 MR. ORSINGER: It does against three
6 because it's never had its claimed against
7 three properly adjudicated.

8 HONORABLE DAVID PEEPLES: Can't you
9 affirm? I mean, if the plaintiff doesn't
10 appeal against one and two, can you not affirm
11 as to them and reverse as to three?

12 MR. ORSINGER: In fact that's likely what
13 will happen.

14 HONORABLE DAVID PEEPLES: Sure.

15 HONORABLE SARAH B. DUNCAN: It's just my
16 problem. Nevermind.

17 CHAIRMAN BABCOCK: Let's see where, what
18 people think about David Peeples' Rule 306
19 generally. Justice Hecht, go first.

20 JUSTICE NATHAN HECHT: The only problem
21 that it doesn't address is the one that the
22 Federal Rules Committee wrestled with the last
23 couple of years, and that is some drop dead
24 catchall date, no matter what, that it's
25 gone.

1 And I reported to you previously that
2 they are going to amend Rule 56 or 58,
3 whichever one it is, to say that if the clerk
4 makes a docket entry that a final judgment has
5 been rendered, then the judgment is final and
6 appealable 60 days later even if the judgment
7 even if it's not entered on a separate piece
8 of paper and in fact it didn't happen. And
9 they've come back now from a lot of good
10 concerns that have been raised and changed
11 that to 180 days, which is the length of time
12 that you would have under the federal system
13 to undo a judgment that you didn't get notice
14 of.

15 So basically they fixed it to where they
16 said "Well, the most you can have even if you
17 don't get notice is 180 days, so why should
18 you have any more notice than that, so we'll
19 give everybody 180 days, and that way we'll
20 treat it like a judgment that you didn't get
21 notice of."

22 And that's to solve the problem of these
23 judgments being reopened two or three or five
24 or eight or ten or however many years later
25 because of problems with (c) that it wasn't

1 unmistakably clear or it was placed in the
2 penultimate paragraph, not the final
3 paragraph, or there was the page break, as you
4 are reading the judgment, you know, one page,
5 and then there's two pages, and at the bottom
6 of the second page it says this language in
7 (c), and then you turn to the third page, and
8 there's the judge's signature. Is that right
9 next to it or whatever?

10 And rather than getting into all those
11 arguments forever they said "Well, that's fine
12 if you want to make that argument 30 or 60 or
13 90 or 120 days after the judgment was issued;
14 but we're not going to let you make it four
15 years later."

16 And I just wonder if there should be some
17 final deadline that's out there somewhere that
18 this is just you've had enough time. And I
19 don't know.

20 CHAIRMAN BABCOCK: Don't you take care of
21 that in 306(a)(1), David?

22 HONORABLE DAVID PEEPLES: I think that
23 says that if the language is not used, all
24 judgements have an extra 90 days on them even
25 if they expressly deal with everything.

1 CHAIRMAN BABCOCK: Right. Which is
2 different from saying at the end of the 90
3 days you are dead in the water; but it's close
4 to saying that, isn't it?

5 HONORABLE SCOTT A. BRISTER: It would be
6 adding to 4 on 306 "Any judgment or order that
7 does not comply with paragraph 2 or 3 remains
8 interlocutory if it is not filed before 180
9 days" or whatever your period is.

10 MR. ORSINGER: I like that proposal a
11 lot. That really limits the potential for
12 harm.

13 CHAIRMAN BABCOCK: Frank.

14 MR. GILSTRAP: I have problems with that
15 in that I don't know what would start the time
16 limit running. You see in the federal system
17 they've got a red letter date. They have got
18 the entry date; and we don't have that. And
19 I'm not sure you would have anything to hang
20 it on without an entry date.

21 JUSTICE NATHAN HECHT: Right.

22 MR. ORSINGER: Don't you have some kind
23 of half formed judgment or something?

24 MR. GILSTRAP: Maybe you've got a series
25 of orders. That's the problem. We don't know

1 what the judgment is. You don't have anything
2 that is labeled judgment, and yet they're
3 always disposed of.

4 JUSTICE NATHAN HECHT: I think Frank is
5 right. It does run from the clerk's entry,
6 and we don't have that. But should it
7 run -- but if we could find a starting point,
8 should it run from the clerk's notice under
9 306a(3)?

10 HONORABLE SCOTT A. BRISTER: Yes. I mean
11 the current way these come up now is the
12 court's clerk is going through looking at old
13 cases that haven't been set that had something
14 and haven't been disposed of, and send out a
15 DWP notice; and that's how we catch these now,
16 a party that hasn't been disposed of or a
17 claim hasn't been disposed of. Everybody
18 thought it was final; but it's not, and it's
19 hanging around, and it's not on the trial
20 docket, and so the clerk sends out a DWP
21 notice for that.

22 CHAIRMAN BABCOCK: Mike.

23 MR. HATCHELL: I think that David's has
24 done a very good job in simplifying a complex
25 situation, so what I'm about to say is not

1 critical. It's just it's a conceptual problem
2 I have with 2 and 4. To me 4 is a very
3 important thing because it keeps judgments, I
4 mean, keeps things from being final.

5 4 says "Any judgment or order that does
6 not comply with 2 or 3 is interlocutory. But
7 2 is not a rule of compliance. 2 is just a
8 presumption. So I don't understand how a
9 judgment complies with a presumption of its
10 own finality.

11 So that leads me to say you're just back
12 where you started and you are trying to figure
13 out, well, what is a judgment; and I don't
14 know that we've gone anywhere.

15 PROFESSOR DORSANEO: That's easily fixed
16 by saying "Any judgment is not made final by
17 paragraph 2 or 3."

18 HONORABLE SARAH B. DUNCAN: But 2 doesn't
19 make the judgment.

20 MR. ORSGINGER: Okay.

21 CHAIRMAN BABCOCK: David, does that
22 strike you as a good thing?

23 HONORABLE DAVID PEEPLES: Well, I think
24 Mike makes a point when he says "comply" with
25 paragraph 2 is the wrong word.

1 MR. ORSINGER: How about "is not final
2 under 2 or 3"?

3 HONORABLE DAVID PEEPLES: That's what
4 Bill said. That's fine. Or does it satisfy
5 him? "Any judgment or order that is not final
6 under paragraph 2 or 3 remains interlocutory"
7 period?

8 CHAIRMAN BABCOCK: Judge Patterson.

9 HONORABLE JAN P. PATTERSON: I think you
10 were about to get a vote on the sense of the
11 house; and I think Justice Hecht's point is
12 well taken to be included within that sense.
13 Would it be appropriate to get a sense?

14 CHAIRMAN BABCOCK: To move the ball
15 along? Yes. Judge Peeples' Rule with
16 something that will fix the, you know,
17 everything that's got to have kind of a bright
18 line end point.

19 HONORABLE SCOTT A. BRISTER: In other
20 words, should we put what the current law is
21 under Lehmann in a Rule or just hope attorneys
22 find the case and read it? That seems to me a
23 pretty easy question.

24 CHAIRMAN BABCOCK: That's another way to
25 put it.

1 HONORABLE SCOTT A. BRISTER: It seems to
2 me we ought to put it in the Rule.

3 HONORABLE DAVID PEEPLES: Could I have
4 that restated by somebody, the concern that
5 Justice Hecht raises on a drop dead point or
6 whatever it is?

7 JUSTICE NATHAN HECHT: Well, for example,
8 under 306(a)(3) if a judgment that is final is
9 signed and you don't get notice of it, the
10 clerk does not send notice, you only have so
11 long, and then you're just out of luck. How
12 long is that? 90 days?

13 HONORABLE DAVID PEEPLES: Don't the Rules
14 already say that?

15 JUSTICE NATHAN HECHT: Yes. All right.
16 Now what if the judgment is not final under 3
17 and not final under any part of 3, and not
18 under 2, and notice by the clerk is set
19 mistakenly, says "We think it is final."

20 HONORABLE DAVID PEEPLES: Uh-huh (yes).

21 JUSTICE NATHAN HECHT: Then query: Should
22 you have a limited time to come in and do
23 something about that?

24 Then the third situation is if the
25 judgment is not final under 3, and no notice

1 is given, what happens?

2 HONORABLE DAVID PEEPLES: Okay. As I
3 understand what you're saying it's a case
4 that's still interlocutory. You've got claims
5 against A and B and C.

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE DAVID PEEPLES: A and B are
8 taken care of, and C is still there. I don't
9 understand why that ought to start becoming
10 final, because the case against C is still
11 alive.

12 JUSTICE NATHAN HECHT: Well, the concern
13 is that somebody -- everybody thought it was
14 final. They just were mistaken about it.

15 HONORABLE JAN P. PATTERSON: And notice
16 was sent.

17 JUSTICE NATHAN HECHT: There was a claim
18 for attorney's fees or something over in the
19 case, and everybody thought they disposed of
20 everything, and they didn't under 2 or 3.
21 They get a notice from the clerk that says
22 final judgment had been rendered under
23 306a(3). Then can somebody come in two years
24 later and say "Well, despite what the clerk's
25 notice says and despite what this order looks

1 like it never did adjudicate this claim for
2 attorney's fees, and therefore it wasn't
3 final; and now we want to reopen the case."

4 HONORABLE DAVID PEEPLES: My thought on
5 that is that most, you know, lawyers use these
6 Mother Hubbard clauses now where they don't
7 even come close to belonging. And I think
8 that if this Rule passes, they would put the
9 language in (c), and what you're positing
10 would almost never happen.

11 But I certainly don't think that when a
12 clerk mistakenly sends out a notice that ought
13 to convert what isn't final into something
14 that is final. I don't think that makes
15 sense. If a case remains pending because some
16 peripheral claim or whatever wasn't
17 adjudicated and they didn't have this Lehmann
18 language, the only harm is that it's still
19 there, and the court still has jurisdiction
20 over it. I think that probably will happen in
21 some cases. It probably happens right now.

22 CHAIRMAN BABCOCK: Bill Dorsaneo, and
23 then let's get a sense of the house.

24 PROFESSOR DORSANEO: I don't think we
25 have that Rule 58 problem. I just don't. I

1 think that's the dynamics of who is running
2 this, the clerk or the judge in the federal
3 system, and dissatisfaction with that method
4 of finalizing things almost from the time it
5 was promulgated.

6 And I think judges, trial judges too will
7 use the Lehmann language. I don't think that
8 they'll try to specifically dispose of each
9 claim without also using the Lehmann
10 language. We could add a sentence that says
11 "If it's only made final because of the
12 Lehmann language, then you know, you have X
13 amount of time to"...

14 Well, maybe I'm not even thinking
15 straight. This defeats my comprehension
16 pretty consistently. No. I just think -- I
17 don't think -- I agree with Judge Peeples. I
18 don't really think it's a problem we need to
19 be too concerned.

20 CHAIRMAN BABCOCK: Bonnie.

21 MS. WOLBRUECK: I guess looking at Judge
22 Peeples' proposal here as a clerk and trying
23 to listen to what finality of the judgment is
24 and not being an attorney, that the clerk will
25 have to determine under Rule 306 if what the

1 unmistakable clarity language was before
2 issuance of a writ of execution because of the
3 90-day period? Is that what that is stating?
4 I mean as a clerk I need to understand what
5 the unmistakable clarity language is in order
6 to issue a writ of execution. Is that
7 correct?

8 HONORABLE DAVID PEEPLES: Well, I think
9 you need to make some determination before you
10 issue that writ that you've got a final
11 judgment to base it on. And I will grant you
12 that sometimes that's hard in some of these
13 complicated cases.

14 MS. WOLBRUECK: And that's where my
15 concern is, is really on executions. And I'm
16 sorry; but I can't always trust attorneys to
17 tell me that, yes, this is a final judgment.

18 MR. ORSINGER: But Bonnie, don't you have
19 that problem right now?

20 MS. WOLBRUECK: Yes, I do. That's the
21 reason I want something that says this is
22 final.

23 MR. ORSGINGER: This is -- well, this is
24 better than the present circumstance perhaps;
25 but not as good as quoted language. But the

1 fear with quoted language is if it's slightly
2 misquoted, it's not operative.

3 HONORABLE SARAH B. DUNCAN: This is the
4 present circumstance.

5 MS. WOLBRUECK: I'll look for that Mother
6 Hubbard clause right now on executions, on the
7 issuance on executions many times; and you
8 know, we have a great deal of difficulty today
9 on issuing executions on many judgments that
10 are perceived to be final. It is an issue.

11 CHAIRMAN BABCOCK: Let's see a show of
12 hands. How many like Judge Peeples' Rule
13 306? How many people don't like it?

14 MS. WOLBRUECK: I have a concern.

15 CHAIRMAN BABCOCK: Well, that's as good a
16 majority as we've gotten, 16 to 3, on any
17 issue on this thing.

18 MR. TIPPS: Chip.

19 CHAIRMAN BABCOCK: Yes.

20 MR. TIPPS: Point of clarification. We
21 previously talked about this. Are you
22 assuming in the vote that 3(a) and 3(b) have
23 the words "expressly" changed to
24 "specifically"?

25 CHAIRMAN BABCOCK: Yes. I had made -- I

1 thought that --

2 HONORABLE DAVID PEEPLES: Yes. I think
3 that needs to be done.

4 MR. TIPPS: I wanted to make sure that we
5 had crossed that bridge.

6 CHAIRMAN BABCOCK: I thought that Judge
7 Peeples accepted that friendly amendment
8 earlier.

9 HONORABLE DAVID PEEPLES: Yes.

10 MR. TIPPS: We talked about it in (a);
11 but I would assume it ought to be in (b)
12 also.

13 CHAIRMAN BABCOCK: Hang on for a second,
14 Richard. We like Judge Peeples' 305 now. So
15 what do we have to do to make it -- yes.

16 MR. ORSINGER: I've got to raise
17 something about that.

18 CHAIRMAN BABCOCK: Okay.

19 MR. ORSINGER: I would like to expand
20 paragraph 2 to include agreed judgments rather
21 than just judgments after a conventional
22 trial, because probably 90 percent of your
23 divorce cases are going to be agreed
24 judgments; and we wouldn't want the Aldridge
25 presumption to apply to agreed judgments as

1 well as a judgment after a conventional trial
2 on the merits.

3 CHAIRMAN BABCOCK: "And a judgment agreed
4 to by all parties"?

5 MR. ORSINGER: That would do it for me.

6 PROFESSOR DORSANEO: I don't know why you
7 want to do that.

8 MR. ORSINGER: But we've got to change
9 the label of section 2 if we're going to do
10 that.

11 PROFESSOR DORSANEO: Richard, I don't
12 understand why you want to do that or if you
13 really want to do that.

14 MR. ORSGINGER: Well, because if we
15 don't, we're not saying how we handle agreed
16 judgments where they fail to expressly
17 adjudicate one of the claims. See, an agreed
18 judgment isn't going to fit either under
19 paragraph 2 or under paragraph 3.

20 PROFESSOR DORSANEO: Why wouldn't it fit
21 under 3(c)?

22 HONORABLE DAVID PEEPLES: It should. And
23 most of the time that language would be in
24 there, wouldn't it, Richard?

25 HONORABLE SCOTT A. BRISTER: Well,

1 they're not going to say in an agreed judgment
2 this is now appealable.

3 HONORABLE DAVID PEEPLES: Hum.

4 CHAIRMAN BABCOCK: Unless they're trying
5 to trick somebody.

6 COMMITTEE MEMBERS: (Speaking
7 simultaneously.)

8 CHAIRMAN BABCOCK: What would be wrong
9 with adding what Richard wants, though? What
10 harm are we doing there?

11 MR. ORSINGER: Maybe you ought to add it
12 to 3 as another or rather than pulling it in
13 2.

14 MR. GILSTRAP: Well, you could have an
15 agreed judgment after a conventional trial on
16 the merits.

17 HONORABLE SCOTT A. BRISTER: I would
18 think --

19 MR. GILSTRAP: Why don't you just have a
20 second paragraph?

21 HONORABLE SCOTT A. BRISTER: Why isn't it
22 covered by 3(a)? For goodness sake, every
23 agreement. You don't enter a settlement as
24 the, you know, --

25 MR. ORSINGER: You don't in your

1 litigation

2 HONORABLE SCOTT A. BRISTER: -- summary
3 case; but we're going to continue litigating.

4 MR. ORSINGER: You don't in your
5 litigation; but you do in mine all the time.
6 I get 20-page pleadings with 30 different
7 triable issues pled in them, and your
8 settlement may or may not touch on every
9 single one.

10 If it's just one car wreck and one
11 plaintiff and one defendant, that will never
12 happen; but in a property case you may have 30
13 triable issues and you may only mention 25 of
14 them in your decree.

15 CHAIRMAN BABCOCK: But listen. Paragraph
16 2, we're just trying to create a presumption
17 for certain things that we know there is a
18 high, high, high probability that the people
19 want the thing over with, that the thing is
20 over with, the case is over with. And why
21 wouldn't agreed judgments be even more subject
22 to a presumption than a conventional trial on
23 the merits?

24 MR. ORSINGER: It should. It should.

25 PROFESSOR DORSANEO: Well, the reason is

1 that we don't exactly know what a judgment is,
2 and there are going to be agreements that you
3 wouldn't say "Well, that's not a judgment.
4 That's just an agreement on some aspect of the
5 case."

6 Now I think what you're worried about is
7 your agreed judgment in which you would
8 probably include some kind of general express
9 language would not be specific enough to
10 satisfy "specifically disposes of all claims
11 between all parties." And if you wanted to
12 add in agreed judgments in 3, what I suggest
13 as a candidate for a potential fix would be
14 "agreed judgment that," and I don't know
15 exactly how to say it, that expressly disposes
16 of all or the entire controversy between the
17 parties specifically or through the use of
18 general language, something like that.

19 And I can see what you're saying. You
20 might say "Well, we have got pots and pans,
21 and we don't want to make this not final
22 because we didn't deal with the particular
23 whatever"; but we did deal with it
24 sufficiently because there is general language
25 saying, you know, like a residuary clause or

1 something like that.

2 HONORABLE DAVID PEEPLES: Just to follow
3 up on it, there are a lot of, so many agreed
4 orders are signed. Richard, we need to be
5 careful that only the ones that have some kind
6 of indication of completeness or finality
7 would be covered; wouldn't you say?

8 CHAIRMAN BABCOCK: How many times do you
9 get agreed judgments?

10 HONORABLE DAVID PEEPLES: Well, if it's a
11 judgment, if it says judgment or decree,
12 that's right. That tells you it's the end of
13 it.

14 HONORABLE SCOTT A. BRISTER: But what if
15 it's an agreed judgment between two of the
16 parties, but not the rest?

17 CHAIRMAN BABCOCK: But what Richard's
18 proposal was "and judgments agreed to by all
19 parties." So that would cure that, wouldn't
20 it? Richard is either in a trance, or he's
21 got his syndrome.

22 MR. ORSINGER: Your suggestion does
23 eliminate that problem; and I'm trying to
24 figure out whether we need a presumption or
25 whether we need it to be under the "only if"

1 clause.

2 JUSTICE NATHAN HECTH: It looks like
3 you'd want it a (d), 3(d) that said everything
4 in (c) except for "and is appealable."

5 PROFESSOR DORSANEO: Yes. I think that's
6 right.

7 MR. ORSGINGER: Uh-huh (yes).

8 CHAIRMAN BABCOCK: I knew there was a
9 reason why he was on the highest court. How
10 about that, Richard?

11 HONORABLE DAVID PEEPLES: Richard, as I
12 understand, your point is there's just an
13 awful lot of decrees and judgments that
14 everybody knows ought to be final, but they
15 don't dispose of everything, and they need to
16 be final, and people can't come back later on
17 and say "Ah-hah, it's not covered here, and
18 there's a hanging-out issue"?

19 MR. ORSINGER: That's right.

20 HONORABLE DAVID PEEPLES: Yes. That
21 needs to be taken care of.

22 CHAIRMAN BABCOCK: Stephen.

23 MR. TIPPS: One way to do that in
24 recognition of the fact really lawyers think
25 of and treat agreed judgments as kind of a

1 different creature from judgments that are a
2 result of a decision by a Court is simply to
3 put in 4 words like "any judgment or order,
4 other than agreed judgments or decrees, that
5 is not final under paragraphs 2 and 3 is
6 interlocutory." And that's seems consistent
7 with the notion that we all know that an
8 agreed judgment is final. That's just an
9 approach.

10 MR. ORSINGER: Well, except that 3 has an
11 "only if" clause that probably would apply to
12 an agreed judgment because an agreed judgment
13 would be a judgment rendered without a
14 conventional trial.

15 MR. TIPPS: We took out the "only."

16 MR. ORSINGER: You took out the "only"?

17 PROFESSOR DORSANEO: No, we didn't.

18 MR. TIPPS: Did we not?

19 PROFESSOR DORSANEO: No, that was my
20 misreading earlier.

21 CHAIRMAN BABCOCK: We did not take out
22 "only."

23 HONORABLE SARAH B. DUNCAN: And speaking
24 of the "only," can I ask a couple of more
25 questions? What is the status of probate

1 court orders and receivership orders and
2 orders that are made appealable by statute
3 after this Rule?

4 HONORABLE DAVID PEEPLES: I left those
5 out; but I think anything by statute is not
6 changed by this.

7 MR. ORSINGER: They're not -- aren't they
8 final?

9 HONORABLE DAVID PEEPLES: This Rule
10 doesn't change something that is otherwise by
11 statute. But if it needs to be stated, it
12 needs to be stated. It's certainly the
13 intent. Lehmann had some language about
14 that.

15 MR. ORSINGER: Why couldn't we just have
16 a paragraph that says "an agreed judgment
17 assigned by all parties disposing of the case
18 is final" and not worry about all these
19 conditions?

20 HONORABLE SARAH B. DUNCAN: Then it is
21 final and not simply presumed final.

22 MR. TIPPS: Why don't you --

23 MR. ORSINGER: To me if is an agreed
24 judgment and all the parties have agreed to
25 it, then it ought to be final. It ought not

1 be presumed final.

2 MR. GILSTRAP: What do you mean by
3 "disposing of the case"?

4 MR. ORSINGER: I don't know.

5 MR. GILSTRAP: Suppose there's property
6 out there that hasn't been divided?

7 MR. ORSINGER: To me I've never seen an
8 agreed judgment between all the parties that
9 was just an agreement on some little part of
10 the lawsuit. The agreed judgments I've seen,
11 you know, takes care of everything. But
12 somebody has said "Well, how do we know that
13 an agreed judgment is an agreed judgment and
14 not an agreed order?" I don't have that
15 concern.

16 But for the people that do have that
17 concern I was trying to say "Well, then let's
18 say a judgment disposing of the case" or
19 something. I don't ever have any trouble
20 finding out whether my divorce decree resolves
21 the case or just part of the lawsuit.

22 MR. GILSTRAP: Well, I'll give you a
23 specific example that's it's long over; but
24 it's a reported case Young vs. Young where it
25 was a tried case. Then after trial the

1 parties agreed to a final judgment. It says
2 Agreed Final Judgment, and it was signed by
3 the lawyers.

4 A year later when we tried to enforce it
5 she gets another lawyer and said this didn't
6 dispose of all the property because there is
7 two million dollars worth of art even though
8 the decree talks about a way to divide it. Is
9 that disposed of? And we went round and round
10 and all the way down here on whether it was
11 final or not. What do you mean by "disposes
12 of the case?"

13 MR. ORSINGER: Yes. I want to make it
14 real easy for people to agree to a judgment
15 that goes final.

16 MR. DUGGINS: And I agree with you. But
17 I'm just saying there's a situation where
18 there could have been a real problem where
19 there --

20 MR. ORSINGER: Okay. Then what I'd just
21 like to say is that an agreed judgment signed
22 by all parties or agreed to by all parties or
23 whatever is final and just leave it at that.
24 I mean, if everybody agrees to the judgment,
25 it's final; and if it's not a judgment and it

1 just like takes care of one claim, then they
2 haven't agreed to a judgment.

3 HONORABLE SARAH B. DUNCAN: Then what do
4 you do about the significant asset that is not
5 covered by the judgment and there is no
6 residuary clause?

7 MR. ORSINGER: The Family Code permits
8 you to file a post divorce proceeding and have
9 the Court divide that in a manner that is just
10 and right, so the Court has the same equitable
11 authority in a post divorce proceeding as they
12 would if they had done it the first time.

13 CHAIRMAN BABCOCK: Stephen.

14 MR. TIPPS: A new suggestion: A new (d)
15 that reads "is an agreed final judgment or
16 decree that had been approved by all parties."

17 CHAIRMAN BABCOCK: How does that sound,
18 Richard?

19 MR. ORSINGER: I'm okay with that.

20 MR. TIPPS: If the parties approve a
21 document that they all say is agreed and
22 final, then it probably is.

23 PROFESSOR DORSANEO: I would like -- I
24 like that; but I would like to add some
25 language that indicates that the parties have

1 designated it as a final judgment.

2 MR. GILSTRAP: It needs to say it's a
3 document entitled an agreed judgment or agreed
4 decree that the parties have signed.

5 MR. LATTING: This is back to the
6 passport of finality.

7 MR. TIPPS: Then you get back to using
8 the magic words.

9 HONORABLE DAVID PEEPLES: An agreed
10 judgment containing language of finality as to
11 all parties. You want the title to say "Final
12 Judgment"?

13 MR. GILSTRAP: I think it should say
14 "Agreed Judgment" or "Agreed Decree," because
15 the problem is you are going to have parties
16 signing off --

17 MR. ORSINGER: If you get an agreed
18 order, you're screwed. Right?

19 MR. GILSTRAP: Yes. It's an agreed
20 order, and it's a judgment.

21 MR. ORSINGER: That's worse than nothing,
22 because all of our suits affecting the
23 parent/child relationship, you know, about
24 half of them would be decrees and suits
25 affecting, and most of them are orders and

1 suits affecting.

2 PROFESSOR DORSANEO: Stephen's language
3 was a good start on this. It sounded good. I
4 just wanted to make a little change in it.
5 What was it again?

6 MR. TIPPS: My language is "(d), is an
7 agreed final judgment or decree that has been
8 approved by all parties."

9 MR. ORSINGER: Doesn't it beg the
10 question of what is final? We're sitting here
11 trying to define what is final; and we say
12 whatever is final is final.

13 PROFESSOR DORSANEO: It would be
14 all right with me to say that it was the
15 parties designated it as a final judgment.

16 CHAIRMAN BABCOCK: How about this
17 friendly amendment, Stephen? "Is an agreed
18 final judgment or decree, denominated as such,
19 that has been approved by all parties."

20 MR. TIPPS: That's fine.

21 MR. GILSTRAP: I think that solves it.

22 MR. ORSINGER: And we still leave the
23 "only" in there so that if they don't
24 denominate it, then it's not final even though
25 it's adjudicated everything?

1 PROFESSOR DORSANEO: No.

2 MR. ORSINGER: If it expressly
3 adjudicates everything, (a) saves it.

4 CHAIRMAN BABCOCK: Right.

5 PROFESSOR DORSANEO: If it
6 "specifically."

7 CHAIRMAN BABCOCK: "Specifically," not
8 "expressly."

9 MR. ORSINGER: "Specifically." What
10 frightened me about that is that people have
11 four different grounds for divorce: marital
12 product claims, equitable interest claims,
13 reimbursement claims, tort claims, and then
14 just a conventional divorce decree at the end,
15 so they've got all kinds of stuff there that
16 they probably haven't even mentioned in a
17 final judgment.

18 CHAIRMAN BABCOCK: Well, but that's
19 okay.

20 MS. SWEENEY: Because it's going to say
21 agreed final judgment and approved by
22 everybody.

23 PROFESSOR DORSANEO: Richard, what shape
24 are you in now that Mother Hubbard died?

25 MR. ORSINGER: Nobody knows that it's

1 dead yet, and so we're okay.

2 PROFESSOR DORSANEO: I suggest you're in
3 deep doo-doo right now.

4 CHAIRMAN BABCOCK: You know it's dead.

5 MR. ORSINGER: I'm not going to tell
6 anybody.

7 CHAIRMAN BABCOCK: Okay.

8 PROFESSOR DORSANEO: God, am I
9 remarried?

10 CHAIRMAN BABCOCK: The proposal is "(d),
11 is an agreed final judgment or degree,
12 denominated as such, that has been approved by
13 all parties." Nothing is perfect, Richard.
14 And this was your idea.

15 MR. ORSINGER: Okay. I'm willing to take
16 it for today.

17 HONORABLE DAVID PEEPLES: Should we take
18 out the word "only" from line nine?

19 HONORABLE JAN P. PATTERSON: Yes.

20 HONORABLE DAVID PEEPLES: It's implicit,
21 don't you think?

22 HONORABLE SARAH B. DUNCAN: Huh-uh (no).

23 CHAIRMAN BABCOCK: Somebody was a fierce
24 advocate of "only," though. I thought it was
25 you.

1 HONORABLE JAN P. PATTERSON: Dorsaneo
2 suggested it.

3 HONORABLE DAVID PEEPLES: But I can see
4 cases, and I can imagine a case where the
5 agreed judgment doesn't get it just exactly
6 right; but the spirit of this is it ought to
7 be final, and I think maybe it would help to
8 take out "only."

9 PROFESSOR DORSANEO: It might be one of
10 those cases where after ten years have passed
11 or something like that say "Oh, go away from
12 here."

13 CHAIRMAN BABCOCK: Okay. Joe, do you
14 want to take "only" out?

15 MR. LATTING: Yes.

16 CHAIRMAN BABCOCK: Okay. "Only" is
17 gone.

18 PROFESSOR DORSANEO: "Only" is usually a
19 bad word.

20 CHAIRMAN BABCOCK: All right. Now how to
21 people feel about this Rule?

22 MR. DUGGINS: Chip, were we going to add
23 or modify paragraph 2 since it's only a
24 presumption?

25 CHAIRMAN BABCOCK: No. I think that

1 adding subparagraph (d) here is going to be in
2 lieu of changing paragraph 2.

3 MR. DUGGINS: In lieu of. We're not
4 doing anything to Rule 301, are we, the Rule
5 that defines judgments?

6 PROFESSOR DORSANEO: No.

7 MR. DUGGINS: The reason I ask that is it
8 seems to me you could sure pull most of 301
9 and fit it in 2 since that 301 is really
10 defining what kind of judgment or what the
11 judgment should be after a conventional trial
12 on the merits.

13 PROFESSOR DORSANEO: I understand what
14 you're saying. 301 would be, the first part
15 of it would be a good candidate for some
16 modification; and there's more to say about
17 this, you know, one final judgment consisting
18 of a series of separate pieces of paper. But
19 this is definite progress; and I don't want to
20 lose it.

21 MR. DUGGINS: I just thought there was a
22 concern about 2 being somewhat incomplete and
23 only a presumption and not having a
24 definition; and it seems to me 301 is a
25 definition. Whether it's a good or bad one,

1 I'm not saying; but it does talk about a
2 conventional trial on the merits conforming to
3 the verdict.

4 PROFESSOR DORSANEO: I think they should
5 all be combined.

6 HONORABLE DAVID PEEPLES: They could be
7 combined.

8 MR. ORSINGER: Well, Rule 301 talks about
9 what you put in a judgment, right? And Rule
10 306 talks about when the judgment is final.
11 Is that right? Because I don't have 301 in
12 front of me.

13 CHAIRMAN BABCOCK: Yes. 301 talks about
14 what is going to be in the judgment.

15 MR. ORSINGER: Okay. Well, we could
16 justify having them in separate Rules; but
17 they ought to be consistent with each other.

18 PROFESSOR DORSANEO: 301 has a lot of
19 stuff in it; and we normally think of it as a,
20 you know, judgment as a matter of law Rule,
21 just a proviso; but it's got this sentence
22 "only one final judgment shall be rendered in
23 any case" language that I think is clarified
24 now that you say over here in this 306 that it
25 can be more than one piece of paper. I think

1 it's odd that you have one final judgment
2 consisting of more than one piece of paper;
3 but it's been odd for a long time.

4 MR. ORSINGER: Maybe we ought to take
5 that sentence "only one final judgment shall
6 be rendered in any case" and move it to Rule
7 306 which talks about finality of judgments.

8 HONORABLE DAVID PEEPLES: I picked 306
9 because I didn't want a new number, and 306 it
10 was easy to get rid of the one sentence that
11 was in this and it was just there. It's kind
12 of like buying a house. You gut it and redo
13 it, you know.

14 MR. ORSINGER: But in the process did you
15 eliminate the requirement that you name the
16 parties?

17 HONORABLE DAVID PEEPLES: Maybe.

18 MR. ORSINGER: So now we have a final
19 judgment, and we just don't know who it's
20 against.

21 HONORABLE DAVID PEEPLES: There's going
22 to be a whole generation of litigation on that
23 issue right there.

24 MR. GILSTRAP: Chip.

25 CHAIRMAN BABCOCK: Well, that's easy to

1 fix, because you can say in 1 here "At the
2 conclusion of the litigation a Court shall
3 render a final judgment or order which shall
4 contain the full name of the parties as stated
5 in the pleadings for and against whom the
6 judgment was rendered." You can put that
7 sentence in 306 back in there if you need to.
8 Yes, Frank.

9 MR. GILSTRAP: What are we going to do
10 about the receivership of probate cases? Are
11 we going to have an express provision
12 excluding them from the operation under the
13 new 306, or do we need it?

14 PROFESSOR DORSANEO: We don't have one
15 now. Why do we need it? It might be better;
16 but this is real progress.

17 MR. GILSTRAP: I agree. It has been
18 raised, and it is in Lehmann.

19 PROFESSOR DORSANEO: But then you have to
20 put the interpleader cases in there, and then
21 there's no place to stop. Well, maybe there
22 is a place to stop.

23 CHAIRMAN BABCOCK: Justice Hecht, what do
24 you think? Do we need to go over receivership
25 and probate and interpleader?

1 JUSTICE NATHAN HECHT: Well, I don't
2 know. I mean, we thought we needed to stress
3 it in Lehmann because we knew it was hanging
4 out there. I mean you could put it in a
5 comment.

6 MR. GILSTRAP: Here's one reason why you
7 might not.

8 PROFESSOR DORSANEO: That's good. Go
9 with that. Be careful.

10 MR. GILSTRAP: Here's one reason why you
11 might be able to not do it, and that is the
12 Probate Code I think has its own provision,
13 and then I think the receivership cases say
14 this is like the Probate Code, therefore that
15 controls. So maybe that solves the problem.

16 CHAIRMAN BABCOCK: How about
17 interpleaders?

18 MR. GILSTRAP: I don't know about
19 interpleaders.

20 PROFESSOR DORSANEO: They've got a
21 similar problem.

22 MR. GILSTRAP: Where does that come
23 from? I guess what I'm saying is where does
24 the notion that interpleaders aren't finality,
25 where does that come from in the law? Does it

1 come from analogy with Probate Code like the
2 receivership cases?

3 PROFESSOR DORSANEO: I don't remember;
4 but I don't think so.

5 MR. ORSINGER: Are you talking about an
6 interpleader is where the estate holder puts
7 the money in the registry of the court and
8 then walks away?

9 PROFESSOR DORSANEO: That can be final
10 and is final if the stakeholder walks away.

11 MR. ORSINGER: Okay.

12 PROFESSOR DORSANEO: But if not, the
13 stakeholder makes it, has some sort of a
14 claim.

15 MR. ORSINGER: Okay.

16 PROFESSOR DORSANEO: And there's a lot of
17 weird stuff like that, maybe not an enormous
18 amount; but there is more than just a little
19 bit.

20 JUSTICE NATHAN HECHT: And isn't it true
21 that if you think the interpleader didn't
22 really walk away or you want to take action
23 against him and he's got an order dismissing
24 him, you have got to do something about that?
25 I think that's right.

1 PROFESSOR DORSANEO: Uh-huh (yes). A
2 comment might be good.

3 MR. ORSGINGER: I'd like to raise the
4 question about whether the one final judgment
5 Rule on 301 belongs over here since we happen
6 to have a new Rule on finality of judgments or
7 whether we ought to leave it in 301.

8 PROFESSOR DORSANEO: I would be happy to
9 move it. I don't understand how the sentence
10 is in any way, shape or form helpful.

11 MR. ORSINGER: It hasn't helped us to
12 date, has it?

13 CHAIRMAN BABCOCK: So why muck things
14 up?

15 MR. ORSINGER: Maybe we ought to take it
16 out since we don't know how to comply with it
17 anyway.

18 CHAIRMAN BABCOCK: Let's just focus on
19 what we've got on this piece of paper there,
20 because there has been some consensus
21 developed today around this piece of paper.

22 MR. ORSGINGER: All right.

23 CHAIRMAN BABCOCK: We've got paragraph 1
24 adding some language from the old 306 saying
25 you have got to say who the parties are.

1 We've got paragraph 2 which we like. We have
2 got paragraph 3 where we're changing
3 "expressly" to "specifically," and we are
4 adding a new subparagraph (d) which says "is
5 an agreed final judgment or decree,
6 denominated as such, that has been approved by
7 all parties."

8 MR. ORSINGER: Strike "only" also.

9 CHAIRMAN BABCOCK: We're striking
10 "only." Sorry. And then in paragraph 4
11 we're saying "Interlocutory Judgments and
12 Orders, any judgment or order that is not
13 final under paragraphs 2 or 3 remains
14 interlocutory" striking the other language
15 that was there.

16 So that's what we've got. Are we happy
17 with it, or do we want to keep tinkering with
18 it?

19 HONORABLE DAVID PEEPLES: Do we really
20 need to add that sentence on lines 2 and 3
21 back about the names of the parties?

22 CHAIRMAN BABCOCK: No. Not if you don't
23 think so.

24 HONORABLE DAVID PEEPLES: Is it
25 conceivable that there is going to be judgment

1 that doesn't name the people that are involved
2 in the case?

3 JUSTICE NATHAN HECHT: Yes. There's a
4 case.

5 HONORABLE DAVID PEEPLES: Really?

6 JUSTICE NATHAN HECHT: Crystal City I.S.D.
7 Vs. Wagner, the San Antonio court held --

8 HONORABLE SARAH B. DUNCAN: Yes.

9 JUSTICE NATHAN HECHT: -- if you leave
10 them out, it doesn't matter.

11 MS. WOLBRUECK: It has happened.

12 MR. HATCHELL: Is doesn't matter?

13 PROFESSOR DORSANEO: Just not all the
14 time.

15 MR. ORSINGER: Put that in his comment.
16 It's a better practice to name the parties.

17 CHAIRMAN BABCOCK: Okay. So how does
18 that cut, the fact that we have got a
19 San Antonio case saying that?

20 MR. ORSINGER: Well, it proves that it
21 can happen.

22 CHAIRMAN BABCOCK: It can happen.

23 MR. ORSINGER: That somebody will write a
24 judgment and not mention. The Court of
25 Appeals had to say by saying "That's okay. We

1 knew who the judgment was against anyway."

2 CHAIRMAN BABCOCK: Why wouldn't you want
3 to put it in there?

4 HONORABLE DAVID PEEPLES: Okay.

5 CHAIRMAN BABCOCK: Okay. All right. So
6 it stays. What other tinkering do we want to
7 do with this proposal? None?

8 PROFESSOR DORSANEO: Not today.

9 CHAIRMAN BABCOCK: Yes. I sense the
10 movement out of this room.

11 MR. ORSINGER: We're about to close this
12 deal here, Chip. Get them to sign, and let's
13 go.

14 HONORABLE DAVID PEEPLES: Chip, I think
15 entry is something we don't really worry about
16 now. This says the entry of the judgment.
17 Why don't we just drop that and say "The
18 judgment shall contain the full names of the
19 parties" and so forth.

20 PROFESSOR DORSANEO: Yes.

21 HONORABLE DAVID PEEPLES: "Entry" here
22 means something different.

23 CHAIRMAN BABCOCK: Yes. That's what I
24 thought.

25 HONORABLE DAVID PEEPLES: So let's take

1 out "entry." Can we do that?

2 CHAIRMAN BABCOCK: Yes. The judgment
3 shall contain the full names of the parties,
4 as stated in the pleadings, for and against
5 whom the judgment is rendered."

6 HONORABLE DAVID PEEPLES: Put that back
7 in.

8 CHAIRMAN BABCOCK: Okay. So we've got
9 that. How many people are in favor of this
10 Rule 306 as revised? Raise your hand. How
11 many against? 16 to 3 in favor. So that's
12 progress. Now tomorrow do we need to talk
13 about 306a, Judge Peeples?

14 HONORABLE DAVID PEEPLES: Well,--

15 CHAIRMAN BABCOCK: Or do you want to
16 state it tonight?

17 HONORABLE DAVID PEEPLES: -- I'll say
18 again, the spirit in which I did 306a was if
19 we want to try to soften, you know, help some
20 people out, give them some more time who get
21 victimized by a judgment that turns out to be
22 final and they didn't know it, we can give
23 them some more time to get it corrected in the
24 trial court or in the appellate court. That's
25 all 306a does really.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE DAVID PEEPLES: If we don't
3 want to do that, fine.

4 CHAIRMAN BABCOCK: Before we go through a
5 whole bunch of language tomorrow why don't we
6 get in the morning get a sense of the house as
7 to whether or not that's something we want to
8 accomplish. Is that okay, Sarah?

9 HONORABLE SARAH B. DUNCAN: Whatever.

10 MR. ORSINGER: She's disavowing
11 authorship of this even though it was her idea
12 originally way back when.

13 HONORABLE SARAH B. DUNCAN: The Rule that
14 we drafted in '95 was substantially different
15 from what has emanated today.

16 CHAIRMAN BABCOCK: Okay. Anything else?
17 Judge Brown is that your hand up, or are you
18 just --

19 HONORABLE HARVEY G. BROWN: No.

20 CHAIRMAN BABCOCK: Be careful.

21 HONORABLE DAVID PEEPLES: What is on the
22 agenda for tomorrow?

23 CHAIRMAN BABCOCK: Well, we've got FED
24 which is a pretty exciting thing. Actually I
25 should say Elaine, I don't know how many

1 people read it, Elaine did a fabulous job on
2 this FED. So if you haven't read it, I mean
3 it's --

4 MR. ORSINGER: Read it tonight. It's
5 that good.

6 CHAIRMAN BABCOCK: It is very well
7 written. We're going to have 19 people
8 tomorrow which is how many people voted this
9 afternoon, so that's it. We're in
10 adjournment. Thanks.

11 (Adjourned 5:12.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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 Advisory Committee on the 15th day of June, 2001, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are \$ 1140.50 charged to Charles L. Babcock. Given under my hand and seal of office on this the 30th day of JUNE, 2001.

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

Anna Renken

ANNA RENKEN, CSR
Certification 2343
Cert. Expires 12/31/02

#005,070DJ/AR