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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 13, 2001

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 13th day of January, 2001, between the hours of 8:38 a.m. and 12:16 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Okay. The issue is whether or not we get credit for all the work we do with respect to CLE, and Joe's been working on that project on behalf of our group and talked about it a little bit yesterday, but, Joe, fill us in more, please.

MR. LATTING: There's a committee of the State Bar called the MCLE committee. It's chaired by Hull Youngblood of San Antonio; and they have accreditation standards;and the slight glitch with the State Bar according this MCLE is that in those standards the -- there are several things that the activities should not be in order to get MCLE accreditation; and so we need to get -- it says that the activity is primarily -- is not a meeting of a Bar Association committee or section of other attorneys, and since this has "committee" on it, they say, "Well, this is a committee," and so they are prohibited from giving us MCLE, which is kind of silly. As Judge Hecht pointed out, this is not a committee of the Bar Association; and, furthermore, we meet and exceed all of the other criteria except for one that says that the meeting should have high quality written materials distributed at or before the time the meeting occurs.

(Laughter.)

MR. ORSINGER: Oh, after.

CHAIRMAN BABCOCK: The court reporter note the laughter after that.

MR. LATTING: We can skate that one probably, and the reason I'm saying all of this is that we are going to be writing to the members of that committee, which happens to be meeting next month, early in February. I'm going to get the names of all the members and then I'm going to send out an e-mail to the members of this committee and ask for some help about perhaps writing them and expressing our interest in getting accorded MCLE status. Yeah, Bill.

PROFESSOR DORSANEO: It seems to me -- and Justice Hecht can correct me or corroborate me on this -- that the American Law Institute meetings have been getting CLE credits for a number of years, and there isn't really any significant difference between that kind of meeting and this kind of meeting. In fact, this kind of meeting may be a more appropriate meeting for CLE credit than that meeting.

MR. LATTING: Yeah. Thank you for saying that. I was going to ask if anybody has any examples like that of things that we might bring to the attention of the MCLE committee, if you would let me know in response to my e-mail which I'm going to send out, and Judge Hecht is going to help us through the Court.

So I think we will get this done, but that's where it stands, and if anybody has any particularly good relationships with anybody that we find out is on this committee, including not least the chairman, Hull Youngblood, or if there are any San Antonio judges who might be able to skirt our course of --

(Laughter.)

HONORABLE SARAH DUNCAN: Again, note the laughter.

MR. LATTING: I mean, persuasive pressure. So that's where it stands, and we will keep on keeping on here.

CHAIRMAN BABCOCK: Okay. Great. Thanks. Yesterday we finished the recusal rule, and Chris has made the changes that we discussed yesterday, and everybody should have a copy of this. So in your spare time this morning, look it over and make sure that it's faithful to what you think we did yesterday, but we won't go into that just yet.

When we stopped yesterday we were on TRAP Rule 9, which is behind the memo of January 10th from Bill Dorsaneo to myself and to all of you, and we were pretty close to the end of a discussion about it, but, Bill, why don't you catch up with it?

PROFESSOR DORSANEO: Okay. On the first

page, changes to TRAP Rule 9, and again, the recommendation from Stacy Obenhaus of Dallas was that we have included in the appellate rules express approval for adoption by reference by one party of briefing particularly filed by another party in the same case. There is a provision of the Federal appellate rules in Federal Appellate Rule 28(i) that's about the same subject, and I based proposed Rule 9.7 on the Federal rule.

As a result of the comments that I heard yesterday at the meeting, Justice Hecht suggesting that this could be simplified and another comment asking why it was worded the way it is, I'm going to make a competing suggestion on this draft. Please look at it. It's entitled "Adoption by Reference. Cases Involving Multiple Parties." The Federal subdivision is entitled "Cases Involving Multiple Parties," and that's why I put that there. I would actually recommend eliminating "Cases Involving Multiple Parties" from the title because all cases involve multiple parties.

So "Adoption by Reference" seems to be really what we're about. Hence, I would begin the rule in the second -- or the proposed rule in the second line before the words "may join in" by saying simply "any party may join in," and then have it read the same way through

the words "in an appellate court."

"Any party may join in a brief," comma, "petition," comma, "response," comma, "motion, or other document filed in an appellate court by another party." Add the words "by another party," comma, "and any party may adopt by reference a part of another's brief, petition, response, motion, or other filed document."

I think that means the same thing, greatly simplifies and clarifies the language based on the sense of what I heard yesterday.

CHAIRMAN BABCOCK: Okay. Joe.

MR. LATTING: I have a question. Does that mean that you can't adopt by reference something filed by an amicus?

PROFESSOR DORSANEO: No.

MR. LATTING: It doesn't have to be -- but it says "by another party"?

PROFESSOR DORSANEO: An amicus is not another party.

MR. LATTING: So you cannot adopt by reference something filed by an amicus.

PROFESSOR DORSANEO: Yes.

MR. LATTING: What's the idea of that? I mean, if an amicus brief beautifully states a position one wants to take, why make us write it over again? Why not

just adopt what's already been filed?

PROFESSOR DORSANEO: I think that may be a good idea.

HONORABLE SARAH DUNCAN: But why do you need to adopt it? If it's before the court and the court also thinks it's beautiful it will be --

MR. LATTING: Well, I guess the question would apply to anything. Why do you need to -- why would you need to adopt anything?

HONORABLE SARAH DUNCAN: To avoid waiver.

MR. LATTING: So why can't you adopt something filed by an amicus?

PROFESSOR DORSANEO: Well, I don't think the amicus brief is going to be -- and if it is, it shouldn't be making independent complaints raising, you know, new issues. Amicus brief just isn't for that function.

MR. LATTING: Okay. Well, just as long as we know that's we're doing that.

MR. EDWARDS: Bill, what does this do to page limits? Because I can see four or five parties getting together and say, "Okay, you brief Point 1, you brief Point 2, you brief Point 3, and I will take one line to adopt all of that and then I will brief Point 4." And somebody on the other side, there's just one of them over there, has a quarter of the pages to respond to a --

CHAIRMAN BABCOCK: That point was raised last night, and we decided, I think, that that was okay.

MR. EDWARDS: I just -- what does the Court think about that? Because they put page limits on these things for a reason.

PROFESSOR DORSANEO: Well, what is the reason? The reason is not to have to read too many pages.

HONORABLE SARAH DUNCAN: And you're going to have the same number of pages, right? If you've got five appellees, they can file five 50-page briefs, and you're going to end up with 250 pages. If each of those appellees files a brief on all four issues on the case, you're still going to have 50 pages; but if each appellee devotes his brief to one issue, you're still going to have 250 pages.

MR. EDWARDS: If that's the case, but you're talking about waiver and other things, and it seems to me that there ought to be some provision for the -- where it's stacked five against one or four against one for the one to have some slack cut on the number of pages available to respond to that sort of a situation.

MR. SOULES: Well, that's not the way the rules work. The one party can be several appellees. He has a right to respond to the brief of every appellate filed against him. Now, in my experience the way this has

worked is when we had multiple parties and they had pretty distinct issues, many issues in common, but some that really were not we would take the party that has -- a group of parties that have the most issues and try to brief those in a single brief and then in order to get emphasis on separateness of some of the other appellants, we would file separate briefs and adopt back but really push to get the pages as few as possible, even though he may be representing six appellants, and he can't do it in 50 pages, given the number of issues.

MR. GILSTRAP: Bill, I shared your concern --

MR. SOULES: And the way to respond to that, if somebody files 250 pages, is for the appellee to focus the court on the fact that they have written and written and written and didn't need to and file little, short briefs in response to certain ones. I mean, to me it's a really bad strategy to put too many pages in even though you're representing a lot of appellants.

MR. EDWARDS: I'm in agreement with you. I just am on the receiving end of it most of the time. I'm usually the one.

MR. GILSTRAP: Well, Bill, I have been there, too, and the fact is under the present rules they can still do it. You know, Party A simply gives an

abbreviated argument and then Party B gives a lengthy argument, and if they want to get together and gang up on you, they can do it now.

MR. EDWARDS: Oh, I understand that.

MR. GILSTRAP: This is just going to make the briefs a little bit cleaner and easier to read.

MR. EDWARDS: I'm just asking.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Back to the amicus problem, it seems to me the way this is worded it says you can adopt by reference parts from another's brief. It doesn't say "parties" there.

CHAIRMAN BABCOCK: Well, but Bill just amended the language.

PROFESSOR DORSANEO: Well, no, at the end he's right. It says "another's." It may be better to say "another" -- the last time it says "another's brief."

CHAIRMAN BABCOCK: Yeah, you're right.

PROFESSOR DORSANEO: Maybe it would be better to say "another party's brief" again. I think the "another" refers back to "party"; but if you're thinking that that needs further clarification, that's easy enough to do.

MR. HAMILTON: Unless we want to allow adoption of that.

PROFESSOR DORSANEO: No. No.

MR. HALL: An amicus brief is received and not filed, and this rule refers to "filed," so it shouldn't be a problem.

PROFESSOR DORSANEO: Good point.

CHAIRMAN BABCOCK: Bill, why don't you go over those changes? You're going to strike "cases involving multiple parties"?

PROFESSOR DORSANEO: The title will be "Adoption by Reference."

CHAIRMAN BABCOCK: Right. And then it's going to say, "In a case involving more than one appellate, appellee" --

PROFESSOR DORSANEO: No. It's just going to begin -- strike out the first two lines except for the last three words of the second line. So it will begin, "Any party may join in" and then going through the existing third line "brief, petition, response, motion, or other document filed in an appellate court." I would add the words after "in an appellate court," "by another party."

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Comma.

PROFESSOR DORSANEO: And then continue after comma, "by another party," comma, and then continue "and

any party may adopt by reference a part of," with deference to Carl whether it's necessary or not, "of another party's brief, petition, response, motion, or other filed document."

CHAIRMAN BABCOCK: Okay. So the -- let me read it one more time for the record. Rule 9.7, "Adoption by Reference. Any party may join in a brief, petition, response, motion, or other document filed in an appellate court by another party, and any party may adopt by reference a part of another party's brief, petition, response, motion, or other filed document." Okay.

MS. CORTELL: Chip?

CHAIRMAN BABCOCK: Yeah, Nina.

MS. CORTELL: This I know is a nit, but have you lost the concept that we're talking about the same case by not referencing the case? And I know that's probably a pretty silly comment, but --

PROFESSOR DORSANEO: No. I don't think it's silly. I would say "by another party in the same case."

CHAIRMAN BABCOCK: Yeah.

JUSTICE HECHT: Why don't you just say, "Any party may join in or adopt by reference a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case"?

PROFESSOR DORSANEO: And that would --

JUSTICE HECHT: Combining the two of them.

PROFESSOR DORSANEO: And that would be clear enough to you to make it plain that we are talking about partial adoption as well as total adoption?

JUSTICE HECHT: Yeah, you're right. "All or part."

PROFESSOR DORSANEO: "All or part"?

JUSTICE HECHT: "Join in or adopt by reference all or part." But it does need to be the same case.

PROFESSOR DORSANEO: Yes. I don't care if the two sentences are combined. It's short enough anyway not to combine them in my view, but it does need to say "in the same case."

CHAIRMAN BABCOCK: Okay. So now it would read, "Any party may join in a brief, petition, response, motion, or other document filed in an appellate court by another party, and any party may adopt by reference all or part of another party's brief, petition, response, motion, or other filed document in the appellate court by another party in the same case."

MR. EDWARDS: I think you need "in the same case" before the comma, before the "and" up there, "appellate court and." Because the way the construction is with the "in the same case" at the end, it applies only

to the second clause.

CHAIRMAN BABCOCK: Okay. So it would be "other filed document," and where would you put "the same case"?

MR. EDWARDS: "Filed in an appellate court in the same case."

MR. YELENOSKY: Why do we need "in an appellate court"? This is a TRAP rule. We could get rid of some verbiage and just say "in the same case."

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: Well, what if it's adopting a brief in the trial courts?

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: What if they try to adopt a brief in the trial court?

MR. YELENOSKY: That's true.

PROFESSOR DORSANEO: I would say we -- that's a problem with Rule 9 altogether, quite frankly. Sometimes appellate documents are not filed in the appellate court, like the notice of appeal.

MR. HALL: What if you begin the sentence with "in a case"?

CHAIRMAN BABCOCK: That's sort of how it used to start. Carl.

MR. HAMILTON: I think it's shorter the way

Judge Hecht said. "Any party may join in or adopt by reference all or part of a brief, petition, response, motion, or other document filed in an appellate court by any party in the same case."

CHAIRMAN BABCOCK: Well, except that somebody said we needed to move "in the same case" to after "in the appellate court."

PROFESSOR DORSANEO: What Carl said is fine, though.

MS. CORTELL: Right. Because they are truncating it, so it's in the right place.

CHAIRMAN BABCOCK: So, Bill, do you want to repeat that back, or do you want me to try to read it again?

MR. EDWARDS: Should be "filed in the same case" not "filed by any party in the same case."

PROFESSOR DORSANEO: Carl, why don't you say again what you just said?

MR. HAMILTON: "Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by the same party" --

PROFESSOR DORSANEO: No, "another party."

MR. HAMILTON: "By another party in the same case."

MR. EDWARDS: I think it should be "filed in the same case" --

MR. YELENOSKY: "By another."

MS. EADS: "By another party."

MR. EDWARDS: -- "by another party."

MR. HAMILTON: "Filed in an appellate court in the same case by another party."

CHAIRMAN BABCOCK: Okay. "Any party may join in a brief, petition, response, motion, or other document filed" --

MS. CORTELL: No, you're missing --

MR. HAMILTON: No. "Any party may join in or adopt by reference all or any part of."

CHAIRMAN BABCOCK: Okay. Well, you're moving "adopt by reference" around now then, is that it?

JUSTICE HECHT: Uh-huh.

MS. CORTELL: You're truncating the two sentences.

CHAIRMAN BABCOCK: Okay. And are we going to keep the "all or any part of" in the "adopt by reference"?

MR. EDWARDS: And I don't think it's "the same case." It's just "the case," isn't it?

CHAIRMAN BABCOCK: Okay. Let me try it again. "Any party may join in or adopt by reference all

or any part of a brief, petition, response, motion, or other document filed in an appellate court in the same case by another party." Is that where we are? Okay.

MR. EDWARDS: And I don't know that you need "same" in there. Just "the case."

CHAIRMAN BABCOCK: What's everybody think about that? Do we need "the same" or not?

PROFESSOR DORSANEO: I like "same." It's a short word. Helps me.

MR. YELENOSKY: So is "such," but it doesn't really convey anything.

It's fine.

MR. EDWARDS: "The" is even shorter.

I won't vote against it if it's "same."

CHAIRMAN BABCOCK: Is there a substantive difference, Bill?

MS. CORTELL: No.

MR. SOULES: I think there is.

MS. CORTELL: You think there is?

CHAIRMAN BABCOCK: You think there is or not?

MR. SOULES: Yeah, I do. I can adopt in another case something in this case unless I say "same case."

MR. YELENOSKY: But if you say "the case,"

there's no other case you could possibly be referring to. It's just like using "such." Why do you need it?

CHAIRMAN BABCOCK: Well, let's say "same" so that there is no ambiguity in it.

MR. YELENOSKY: Let me add a letter. Why don't we say "in the appellate court" instead of "an"?

CHAIRMAN BABCOCK: That's what it says, "in the appellate court." That's what I --

MR. YELENOSKY: Is that what you read?

MR. EDWARDS: Well, that would prevent you from adopting something that was filed in a court of appeals in a brief before the Supreme Court, wouldn't it?

CHAIRMAN BABCOCK: "Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in" -- there is an "an" there, Steven.

MR. YELENOSKY: So it should be "an"?

CHAIRMAN BABCOCK: Should be "an" or "the"?

MR. YELENOSKY: Depending on whether you want to be able to cite in the Supreme Court a brief filed in the appellate court, is what Bill is suggesting.

MR. EDWARDS: I don't know whether you want to do that or not.

CHAIRMAN BABCOCK: How do we feel about that?

HONORABLE SARAH DUNCAN: You've always been able to do that.

CHAIRMAN BABCOCK: You've always been able to do that?

HONORABLE SARAH DUNCAN: To rely on your brief in the court of appeals in the Supreme Court.

JUSTICE HECHT: I don't see any harm in it.

CHAIRMAN BABCOCK: "In an appellate court by another party" -- no.

MS. GAGNON: "In the same case."

HONORABLE SARAH DUNCAN: "In the same case."

MS. BARON: Sarah, though, I don't think you can adopt part of a brief. Can you do that?

JUSTICE HECHT: Adopt part of a brief?

MS. BARON: You certainly can't do it in the petition. I don't think you could do it in brief in the merits. Could you adopt part of your court of appeals brief and just attach part?

MR. CHAPMAN: It's not helpful to have these private conversations.

JUSTICE HECHT: I don't see why not.

MR. CHAPMAN: I'm just asking you to speak up.

CHAIRMAN BABCOCK: Pam, raised the question of whether or not you could adopt part of the brief, and

if this language goes through then the answer would be "yes." And the response was, "Why not?"

MR. SOULES: No reason.

CHAIRMAN BABCOCK: And Pam says "why," but --

MS. BARON: Yes.

CHAIRMAN BABCOCK: Okay. With that language, does anybody have any other comments? Do we have a motion to adopt that language?

PROFESSOR DORSANEO: I move to adopt the language embracing all of these changes.

HONORABLE SARAH DUNCAN: Second.

CHAIRMAN BABCOCK: Any second? Sarah seconds. Any further discussion?

All in favor raise your hand. All opposed? 27 to nothing it passes.

Okay. Bill, let's go on.

PROFESSOR DORSANEO: The next one involves Appellate Rule 34, which is the rule about the appellate record. In that rule there is coverage of what we now call the clerk's record in subdivision 34.5 and the reporter's record in subdivision 34.6. Diana Faust, a lawyer in Dallas, noted that subdivision 34.5, paragraph (e) provides for --

HONORABLE SARAH DUNCAN: 34.6 or 5?

PROFESSOR DORSANEO: 34.5, that that 34.5(e), which is not what we're proposing to change, contains language allowing for the inclusion in the clerk's record of an accurate copy of a missing exhibit. She noted that there is no similar language clearly stated in 34.6 for the reporter's record. As a result of that discrepancy a small group of the TRAP subcommittee on appellate rules worked on Rule 34.6 and actually worked on subdivisions (e) and (f).

After our last meeting in which we were sent back to work on this some more, a larger group of the TRAP subcommittee, you know, reconsidered the matter and this is what we came up with. 34.6(e), which is about inaccuracies in the reporter's record, and you need to think of it probably in that way, something in the reporter's record that doesn't look accurate. This is not what happened in the court below, that's not what the witness said, despite what the reporter's record shows. That's not the exhibit that was introduced at the hearing or trial, a slightly different looking item was the actual exhibit, and we worked on 34.6(e), quite frankly, to clarify that the inaccuracy can be an inaccuracy concerning the exhibit and not merely the testimony.

As I said at the last meeting, in retrospect I am not altogether sure that it doesn't mean that right

now anyway, but it's at least easier to understand in the way we've redrafted it.

The changes are, one, in the first subparagraph or -- I always get confused with the new iteration whether I'm talking about subdivisions, paragraphs, or subparagraphs, but in (e)(1) added in the title "Correction of Inaccuracies by Agreement," to make it clear that the mindset of the people reading this subdivision as a whole has to be "We are correcting inaccuracies."

(2), "Correction of Inaccuracies by Trial Court," and the additional language simply makes it plain or plainer that if the accuracy of an exhibit designated for inclusion in the reporter's record is disputed and the parties cannot agree on what constitutes an accurate exhibit, the trial court must correct the reporter's record by conforming the text of the record to what occurred in the trial court or by adding an accurate copy of the exhibit.

I'm confident now in this draft that the new language is underlined and the old language that's meant to be eliminated, which in this context is just to eliminate the word "conform," because it's replaced with more language to the same effect as "is complete." So whether we do this separately or together with the other

piece, 34.6(e), I'd say one other thing in light of our discussion last time. Last time at least I was confused about whether there is such a thing as a recorder's record that's different from a reporter's record in a case where we have a court recorder electronically taking the record in the trial court rather than a court reporter operating in the normal way. As pointed out at the last meeting, I believe by Richard Orsinger, both of those things are called reporter's records. Both of those things are called reporter's records.

So this 34.6(e) is about both kinds of reporter's records, the one prepared by the reporter in the normal way and the one prepared by the court recorder. At least that's how I would read the rule from top to bottom. I recommend adoption of 34 -- I think the subcommittee as a whole recommends adoption of this version of TRAP 34.6(e).

CHAIRMAN BABCOCK: Second? Carl?

HONORABLE SARAH DUNCAN: Second.

CHAIRMAN BABCOCK: You second. Okay, Carl.

MR. HAMILTON: I have a question.

CHAIRMAN BABCOCK: Yeah. We will discuss it.

MR. HAMILTON: The fact that we talk about exhibits in (e)(2) but not (e)(1) suggests that you can't

correct an exhibit by agreement.

PROFESSOR DORSANEO: No. It may suggest that, but it's not intended to. I don't think it suggests that, either.

CHAIRMAN BABCOCK: Any other comments? Look good to you, Pam?

MS. BARON: Looks great.

CHAIRMAN BABCOCK: Not only good but great?

MS. BARON: Yes.

CHAIRMAN BABCOCK: With that endorsement, we have a motion seconded. Any further discussion?

All in favor of the proposed changes raise your hand.

MR. JACKSON: I just have a little -- how do we get these rules put on the table here to talk about them? I don't have any problem with anything on this as a court reporter, but there is a rule that is a real problem for court reporters, and I just would like an opportunity to talk about that either this meeting or some meeting when we're on the agenda or whatever.

CHAIRMAN BABCOCK: David, why don't you write me a letter --

MR. JACKSON: Okay.

CHAIRMAN BABCOCK: -- and suggest what the problem is?

MR. JACKSON: Great.

CHAIRMAN BABCOCK: And if the Court wants us to study it then we will study it; and if the Court doesn't want us to study it, we will just suffer in silence. Okay.

MR. EDWARDS: Is there a real reason for not having the exhibits in (1), correcting exhibits without recertification by the reporter?

CHAIRMAN BABCOCK: Bill?

PROFESSOR DORSANEO: No. I think, to me, it would never occur to me that (1) is not about the exhibit part of the reporter's record.

MR. EDWARDS: Well, except that you go down and you start speaking about exhibits specifically in (2) and then you get into exclusio onis rule.

PROFESSOR DORSANEO: Uh-huh.

MR. SOULES: Here we say --

PROFESSOR DORSANEO: I don't think it's a problem. I don't mind changing (1).

MR. SOULES: That's an exhibit designated for inclusion in the reporter's record. There's two things in the reporter's record, but the reporter's record is the transcript of the testimony and all the exhibits.

PROFESSOR DORSANEO: When I read the beginning of (e)(2) I'm more thinking about testimony

because I'm thinking about, you know, whether the reporter's record accurately discloses what occurred, and it makes me feel more that it's talking about, you know, what somebody said.

MR. SOULES: Well, you could say "for the reporter's record of testimony" or "the trial proceeding."

HONORABLE SARAH DUNCAN: Why don't we just add "exhibit" to (1)?

PROFESSOR DORSANEO: You want to do that?

HONORABLE SARAH DUNCAN: Yes. I mean, I agree. I have never understood this rule to not refer to exhibits, but once you change (2) to expressly include exhibits we can all just hear people arguing that exhibits aren't included in (1), although I don't know why we would ever argue about it since it's by agreement, but it's easy just to include it.

CHAIRMAN BABCOCK: So where would you insert it, Sarah?

HONORABLE SARAH DUNCAN: "The parties may agree to correct an inaccuracy in the reporter's record," comma, "including an exhibit," comma, "without the court reporter's recertification."

MR. SOULES: That's fine.

CHAIRMAN BABCOCK: Is that okay with everybody?

MR. SOULES: Yes.

CHAIRMAN BABCOCK: All right. Any further discussion?

PROFESSOR DORSANEO: That's better.

CHAIRMAN BABCOCK: Okay. Then all in favor of the proposed amendments to TRAP Rule 34.6(e), raise your hand.

Since everybody had their hand up, that's unanimous, 31 to nothing.

Okay. What's next, Bill?

PROFESSOR DORSANEO: (f). Now, (f) is the one that Diana Faust probably wanted us to be working on all along, and I wasn't smart enough to realize that until recently. 34.6(f) is about something of at least another dimension than what 34.6(e) covers. 34.6(f) is when the record or part of it, including a significant exhibit, is lost or destroyed, just missing, and, well, what happens there?

And I think to summarize the traditional law on the subject, the case would have to be -- the judgment in the case would have to be reversed and the case remanded to be done over because it couldn't be reviewed on appeal. That at least was the general rule and the way the rule book was worded under the 1986 version of the Texas Rules of Appellate Procedure, building on what was

said in the former Rules of Civil Procedure covering the same subject.

When the appellate rules were redone, a significant modification was made in that earlier approach, which, of course, there was some reluctance to follow in cases where the entire record wasn't lost, and the rule now provides, "An appellant is entitled to a new trial if, without the appellant's fault, a significant exhibit or a significant portion of the reporter's records/notes has been lost or destroyed."

So that's an important limit on entitlement to a new trial. The portion of the record that's gone, the missing exhibit, has to be significant. The rule also talks about the same concept in different terms in (f)(3). "The lost, destroyed, or inaudible portion of the reporter's record or the lost or destroyed exhibit must be necessary to the appeal's resolution." So we have made it much harder for there to be a new trial because part of the record or an exhibit or two have been lost or have been destroyed.

Now, the issue that actually is before this committee and the subcommittee debated is, well, if it's a lost or destroyed situation, should we allow for -- assuming the parties cannot agree, replacement of the missing part by the trial court or by the court of

appeals. And the, I think, bottomline conclusion of the committee, subcommittee, is that, yes, for exhibits, but no for missing parts of the record in other senses, and I think that was Faust's proposal.

Faust's proposal was what sense does it make, even if we're talking about a significant exhibit that's necessary to the resolution of the appeal, to have a new trial if it could be replaced by the trial court or by the court of appeals such as in the case mentioned by Justice Brister at the last meeting, when the same exhibit is used in a companion case and everybody knows it. So that's what we tried to draft.

Instead of saying in the last part "if the parties cannot agree on a complete record," the proposal is "if the parties cannot agree on replacement of the lost, destroyed, or inaudible portion of the reporter's record or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit or exhibits cannot be replaced with copies that are determined to accurately duplicate the original exhibits with reasonable certainty by the trial court or the court of appeals."

Now, whether the mechanics of that are right, whether the iteration or enumeration could be improved are distinct issues from the concept itself; and I think, Mr. Chairman, the concept is should we allow

someone other than the parties to replace the missing or lost part and should that be limited to exhibits, if we're going to allow it to be done at all?

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: So I'll move and I think the subcommittee moves adoption -- although I changed the language a little bit after the meeting pursuant to instructions to draft it the way that the subcommittee wanted it to be written -- the adoption of this replacement language in proposed (f)(4) for current (f)(4).

CHAIRMAN BABCOCK: Second?

PROFESSOR CARLSON: Second.

CHAIRMAN BABCOCK: All right. Any further discussion or any discussion? Frank.

MR. GILSTRAP: Bill, I'm in complete agreement with this. If you want, I'd like to monkey with the syntax a little. I mean, I don't see what the term "or exhibits" adds after "exhibit." In the prior sentence you talk about "exhibit." Then you say "missing exhibit or exhibits" and I don't see why we need the second "or exhibits." And then --

PROFESSOR DORSANEO: I don't have any particular pride of authorship, Frank. I'm just trying to say plainly what I think the subcommittee wanted it to

say.

MR. GILSTRAP: And two lines below that I think "exhibit" should be singular, take the "s" off "exhibit." "Exhibits."

HONORABLE SARAH DUNCAN: I have a little draftsmanship --

CHAIRMAN BABCOCK: Let's do this. Is everybody in agreement with Frank's idea?

MR. HALL: Yes.

CHAIRMAN BABCOCK: So, Frank, you're saying that on the third line "destroyed exhibit and the missing exhibit," striking the words "or exhibits"?

MR. GILSTRAP: Correct.

CHAIRMAN BABCOCK: All right. And then you have another change?

MR. GILSTRAP: The second line from the bottom, the term "original exhibits" should be "original exhibit," singular.

CHAIRMAN BABCOCK: All right. Anybody have any problem with that?

Okay. Sarah now.

HONORABLE SARAH DUNCAN: Just for parallel structure I think we ought to change the first part to be "The lost, destroyed, or inaudible portion of the recorder's record cannot be replaced by agreement of the

parties" and then go on "or the missing exhibit cannot be replaced."

HONORABLE SCOTT BRISTER: Right.

HONORABLE SARAH DUNCAN: Just for parallelism.

CHAIRMAN BABCOCK: All right. So read that how you would have it again.

MS. SWEENEY: You-all speak up, please.

HONORABLE SARAH DUNCAN: "The lost, destroyed, or inaudible portion of the reporter's record cannot be replaced by agreement of the parties or the lost" -- "the missing exhibit cannot be replaced with a copy that is determined to accurately duplicate the original exhibit with reasonable certainty by the trial court or the court of appeals."

CHAIRMAN BABCOCK: I don't know if everybody else followed that, but I sure didn't. Start -- what are you striking in the beginning of subparagraph (4)?

HONORABLE SARAH DUNCAN: I'm striking "if the parties cannot agree on a replacement of."

CHAIRMAN BABCOCK: So you're striking that.

HONORABLE SARAH DUNCAN: Uh-huh. Beginning with "the lost, destroyed, or inaudible portion of the reporter's record" and then we're adding "cannot be replaced by agreement of the parties."

CHAIRMAN BABCOCK: Don't you mean to say "if the lost, destroyed, or" --

HONORABLE SARAH DUNCAN: I don't know how these ifs ever got in there to begin with, but yes.

CHAIRMAN BABCOCK: So "If the lost, destroyed, or inaudible portion of the reporter's record cannot be replaced" --

HONORABLE SARAH DUNCAN: "By agreement of the parties."

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: "Or the missing exhibit cannot be replaced with a copy."

CHAIRMAN BABCOCK: Okay. You're striking language now again, right?

HONORABLE SARAH DUNCAN: Yeah. I'm striking "or cannot agree on replacement of the lost or destroyed exhibit."

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: And I guess that relates back to my comment that the reporter's record includes the exhibits, so I don't see why you need it.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: "Or the missing exhibit cannot be replaced with a copy that is determined to accurately duplicate the original exhibit with

reasonable certainty by the trial court or the court of appeals."

CHAIRMAN BABCOCK: Okay. Bill, you got -- is that okay with you?

PROFESSOR DORSANEO: That's -- you know, that's fine.

HONORABLE SARAH DUNCAN: It's just grammatical.

PROFESSOR DORSANEO: You want to make it parallel to (3).

HONORABLE SARAH DUNCAN: I want to make the two parts of (4) parallel.

PROFESSOR DORSANEO: Huh?

HONORABLE SARAH DUNCAN: I want to make the two parts of (4) parallel in structure. That's all it is.

CHAIRMAN BABCOCK: Okay. So it would read now -- and read along with me, Sarah, and make sure I'm right. "If the lost, destroyed, or inaudible portion of the reporter's record cannot be replaced by agreement of the parties or the missing exhibit cannot be replaced with a copy that is determined to accurately duplicate the original exhibit with reasonable certainty by the trial court or the court of appeals." Is that correct?

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: All right. Any further

comment? Yes, Pam.

MS. BARON: Well, now it seems like we have taken out the ability of the parties to agree on the lost or missing exhibit.

PROFESSOR DORSANEO: Exhibit.

MS. BARON: So that if we're going to decide that we needed the change to (e) to say that the reporter's record needed the words "including any exhibits" to make sure that people knew that you could -- that the reporter's record included exhibits, we would need to do that here in the first part of (4) of "the lost, destroyed, or inaudible portion of the reporter's record including any exhibits."

HONORABLE SARAH DUNCAN: Right.

PROFESSOR DORSANEO: Well, it's not fine with me, because of what Pam said, and I think changing the last part to talk about exhibit, "a copy is determined," "original exhibit," and I will embrace all of that, but otherwise I'd like to leave it to make it clear that the first deal is the parties do it, and if they can't do it then you go get help.

CHAIRMAN BABCOCK: Okay. How does everybody feel about that? Bill.

MR. EDWARDS: Oh, I had something else.

CHAIRMAN BABCOCK: Okay. What else?

MR. EDWARDS: I have a hard time understanding how the court of appeals is going to determine with reasonable certainty that a missing exhibit was what was introduced in the trial court.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SARAH DUNCAN: Me, too.

HONORABLE SCOTT BRISTER: Well, it's possible -- I mean, if during the trial you read from it, you read from the exhibit, we can look at this. That's an exact quote. All we need for the appeal is the exact quote. The process of abating, referring back to the trial court for a hearing is the alternative and probably often the way you would -- or usually the way you would do it, but I can imagine circumstances where that would be just an extra waste of time.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. EDWARDS: If the trial court won't agree to it then I don't see where the court of appeals can say with reasonable certainty, that court not having been there, that that exhibit is what it is. I have a real hard time with that.

HONORABLE SCOTT BRISTER: Well, you're assuming, though, both have a hearing on this or make a ruling on it?

MR. EDWARDS: No. I'm assuming -- you know,

I don't know how the appellate court knows what happened in the trial court without the information being in the trial court's record.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: I think I agree with Bill in some ways. I am not sure a court of appeals really has jurisdiction to make fact findings, and in the immediately preceding rule the only procedure that we have for resolution of inaccuracies is for a remand to the trial court to determine. This is a new concept that I've never seen before in which appellate courts are now sitting to determine accuracy separate and apart from the agreement of the parties.

CHAIRMAN BABCOCK: Bill, what do you think about that?

PROFESSOR DORSANEO: I put "the court of appeals" in there recognizing that this issue is an issue. I put it in there because I thought what Judge Brister said was right much of the time. You know, we could talk about it in more detailed ways by saying that the court of appeals can refer it to the trial court or must refer it to the trial court or whatever, and that's done in some other cases or take out "the court of appeals." I am not all that concerned what it -- you know, what it ends up saying.

CHAIRMAN BABCOCK: Okay. So leave "the court of appeals" in or take it out? Sarah, you want it in or out?

HONORABLE SARAH DUNCAN: I don't see how we can do this. I mean --

CHAIRMAN BABCOCK: You mean draft the rule or keep "the court of appeals" in?

HONORABLE SARAH DUNCAN: Keep "the court of appeals" in there. I don't see --

CHAIRMAN BABCOCK: So you want it out?

HONORABLE SARAH DUNCAN: Yeah. I don't see how we're in a position to make those kinds of determinations.

CHAIRMAN BABCOCK: Pam, you want it out?

MS. BARON: I think that the court of appeals would end up 95 percent of the time sending it back to the trial court for determination. So I don't feel strongly one way or the other.

PROFESSOR DORSANEO: Me, too.

CHAIRMAN BABCOCK: Judge Brister?

HONORABLE SCOTT BRISTER: Same.

CHAIRMAN BABCOCK: So sort of a consensus we ought to take it out, particularly if Hatchell wants to take it out.

PROFESSOR DORSANEO: Out.

CHAIRMAN BABCOCK: So it's a period after "trial court." Okay. Now, what about back to the issue between Bill and Sarah on the kind of the rewording, wholesale rewording? Bill's back to the point where he says he wants the original language, "if the parties cannot agree on replacement," etc. He's willing to concede the striking of "or exhibits" and to change the plural "copies" to a "copy" and "are" to "is," but that's as far as you're willing to go, right?

PROFESSOR DORSANEO: Yes. Only because I think that the suggested replacement language doesn't replace the language. It changes it.

CHAIRMAN BABCOCK: Okay. So that's --

HONORABLE SARAH DUNCAN: I don't understand. I mean, all I'm saying is that the two parts of the sentence aren't parallel structure, and for that reason it's a little difficult to read. I don't have any problem at all with the substance of it.

PROFESSOR DORSANEO: Well, maybe let me try this to be a third alternative. "If the lost, destroyed, or inaudible portion of the reporter's record or any lost or destroyed exhibit cannot be replaced by agreement of the parties" -- well, you know, I just don't -- I don't think that I'm going to back off doing that. I don't think that improves it. I think it just changes it.

CHAIRMAN BABCOCK: I'm no English major, but -- or even an English minor, but this subparagraph (4) as drafted before us looks okay to me. I mean, I understand it.

HONORABLE SARAH DUNCAN: But --

CHAIRMAN BABCOCK: And that's a fairly low level of intelligence, but --

MR. SOULES: This is not worth the transaction costs.

HONORABLE SARAH DUNCAN: I agree. I completely agree.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: I'm concerned about the standard that the trial court is to use to make this rather important decision. Do we have any case law that says what "significant" means? The first time I've heard that "significant" is supposed to mean the same thing as "is necessary for the appeal's resolution" was just now.

PROFESSOR DORSANEO: Well, I didn't say that.

HONORABLE SARAH DUNCAN: "Significant" is in the existing rule.

MR. WATSON: Well, I don't care if it came down from heaven on a rope. It's still not giving us a standard that I think trial judges can apply. What is

significant?

HONORABLE SARAH DUNCAN: I don't think the trial court is going to decide what is significant. The trial court is going to decide with reasonable certainty whether a copy accurately duplicates an original exhibit. The court of appeals is going to decide whether it's significant.

MR. WATSON: We're also talking about -- say again, now. You may have -- I may have missed the point completely, Sarah.

HONORABLE SARAH DUNCAN: I don't think there is anything in here that charges the trial court with the responsibility of deciding whether the missing portion of the record is a significant portion for purposes of the appeals. All the trial court decides, and I thought what you were going to question, is the "with reasonable certainty," is the standard for the trial court to decide whether a copy accurately duplicates an original exhibit.

And I have a problem with "reasonable certainty," but I guess that's a different question from the one you're posing.

CHAIRMAN BABCOCK: Yeah, Luke.

MR. SOULES: Well, the rule -- we're kind of talking about this rule as though it were inverted from the way it actually is. The way it starts out is, "The

party is entitled to a new trial."

PROFESSOR DORSANEO: Yeah, I don't like that.

MR. SOULES: And then Skip's point is if there's a significant portion missing and some of these things don't happen, is the significant portion missing a satisfactory standard upon which to force the parties back to a new trial, or should it be some other words that trigger forcing the parties back for a new trial?

MR. WATSON: I still see there's a necessary interplay between "significant" and "is necessary for the appeal's resolution" if you're going to get back to a new trial. Both of those things have to be found.

PROFESSOR DORSANEO: Yes.

MR. WATSON: And I'm not clear if -- I don't see how one could find one without finding the other, and if that's the case --

PROFESSOR DORSANEO: Well, sure you can, Skip.

HONORABLE SARAH DUNCAN: Sure you can.

PROFESSOR DORSANEO: Let's say it's a significant exhibit based upon one claim or defense, but it turns out that the case could be decided on another basis the same way, such as a claim or defense, that the exhibit is pertinent to and controls is not necessary to

the appeal's resolution.

MR. HATCHELL: All the medical records were lost in a case decided on limitations.

MR. WATSON: Okay. Got it. Thanks. Thanks.

PROFESSOR DORSANEO: No, I don't like the way a lot of this is worded. I mean, this is an appellate rule and we're talking about the trial.

MR. SOULES: In Mike's example do they get a new trial?

MS. BARON: No.

MR. SOULES: Why not? It was significant.

MR. EDWARDS: But it wasn't necessary for determination of appeal.

MR. SOULES: Then why are we saying "significant" and not saying --

JUSTICE HECHT: You've got to meet all three.

CHAIRMAN BABCOCK: You've got to meet all three, Luke.

MR. SOULES: What?

MR. YELENOSKY: They need to have three as well.

CHAIRMAN BABCOCK: Okay. But we are only talking about amending subparagraph (4), right?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: We can go tackle the rest of the rule.

MR. SOULES: Oh, I gotcha. I gotcha.

PROFESSOR DORSANEO: After working on looseleaf books for more than 25 years I don't claim to be able to make it perfect this time, just better.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: Bill, in (4) -- and Sarah's comments triggered this thinking in me. There's really a subpart (i), "If the parties cannot agree on replacement of the lost or destroyed or inaudible portion of the reporter's record, or, (ii), cannot agree on replacement of the exhibit." Those are the two concepts; is that right?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SARAH DUNCAN: And, actually, without regard to this numbering, it's, A, the parties can't agree on the missing portion of the testimonial record; or in the case of a missing exhibit the parties can't agree on a replacement and the trial court can't determine with reasonable certainty that a copy accurately duplicates. I mean, it's testimonial record, A; exhibits, B; and B has two parts.

PROFESSOR DORSANEO: I agree with that. I

don't -- but I agree with Luke. I don't think it's absolutely necessary to spend all the time rewording that because that's what it says to me.

JUSTICE HECHT: Okay.

PROFESSOR DORSANEO: But if you think otherwise, we can certainly go back to the drawing board.

JUSTICE HECHT: Okay.

MR. SOULES: Can we vote?

CHAIRMAN BABCOCK: Well, we can as soon as Mr. Tipps' comment is heard.

MR. TIPPS: I think the term "with reasonable certainty" in the next to the last line should be moved to after "determined" because I think that's what we're saying is the basis for the determination.

PROFESSOR DORSANEO: That's fine. I'll accept that. I accept that.

CHAIRMAN BABCOCK: Okay. So you're going to move "with reasonable certainty" to after the word "determined" in the line right above it?

MR. TIPPS: Yes.

MR. EDWARDS: Wouldn't you take "by the trial court," too?

MR. TIPPS: Yeah.

PROFESSOR DORSANEO: Uh-huh.

MR. TIPPS: "Determined with reasonable

certainty by the trial court to accurately duplicate the original exhibit."

PROFESSOR DORSANEO: Yes. Taking out "by the court of appeals" makes that work better. That's why --

CHAIRMAN BABCOCK: All right. So we're going to vote here. Subparagraph (4), "If the parties cannot agree on replacement of the lost, destroyed, or inaudible portion of the reporter's record or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit cannot be replaced with a copy that is determined with reasonable certainty by the trial court to accurately duplicate the original exhibit," period. So that's what we're voting on.

Everybody in favor of that language raise your hand. Is your hand up, Pam?

MS. BARON: No.

CHAIRMAN BABCOCK: 28 in favor. Anybody opposed?

None opposed, with one abstention.

MS. BARON: I think the way you read it is not the way we had agreed, is my concern. Did we move the opening clause? Bill, I thought you had not agreed to that.

CHAIRMAN BABCOCK: He did not agree to that.

MR. GILSTRAP: It's not moved.

MS. BARON: I thought you moved it when you read it.

CHAIRMAN BABCOCK: I did not move it when I read it.

MS. BARON: I thought you started with "if the lost, destroyed, or inaudible portion."

CHAIRMAN BABCOCK: I did not say that.

MS. BARON: Okay. Then my hearing is going.

CHAIRMAN BABCOCK: So will you vote for it now?

MS. BARON: I'll vote for it now.

CHAIRMAN BABCOCK: All right. 29 to nothing.

MR. JACKSON: Bonnie, heard that, too, so --

MR. YELENOSKY: Let's have the court reporter --

CHAIRMAN BABCOCK: Well, I'll read it again just so we're clear.

MR. SOULES: Well, we're not going to reverse it.

CHAIRMAN BABCOCK: We're not going to reverse it.

MR. SOULES: That's the way I think everybody understood it.

CHAIRMAN BABCOCK: "If the parties cannot agree on replacement of the lost, destroyed, or inaudible portion of the reporter's record or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit cannot be replaced with a copy that is determined with reasonable certainty by the trial court to accurately duplicate the original exhibit." Okay.

MS. BARON: That sounds great.

CHAIRMAN BABCOCK: I hope I read it that way the first time, but if I didn't, the record will reflect that that's how I meant to.

Okay. Let's go to the next one, 46.5.

PROFESSOR DORSANEO: 46.5, voluntary remittitur. To try to give you a little bit of history on this, the remittitur rules in the original appellate rules, 1986 rules, were a problem for the reporters to the courts, Carl Dally and myself; and TRAP Rule 85 was never considered by us to be a master work; but it has -- and the current appellate rule has, you know, within it a provision dealing with the arcane subject of voluntary remittitur.

And what this is meant to be about, what it was meant to be about is a case in which the court of appeals reverses the trial court's judgment and it's clear that the court of appeals reversed the judgment because of

a legal error, maybe the admission of evidence, maybe some other kind of legal error, and the party whose judgment is reversed wants to buy an affirmance by saying, "I will voluntarily remit what's necessary to eliminate the taint caused by the error," and that's the concept here in this voluntary remittitur rule.

"If the court of appeals" -- the current language, "If the court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may voluntarily remit." Now, the question is voluntarily remit what? Okay. And the Rule 85 said, "may voluntarily remit such amount," ambiguously suggesting, you know, some amount, but not saying in so many words what amount or what that was understood to mean, at least by me and perhaps by the chair of the combined committee on the original appellate rules, Chief Justice Clarence Guittard, was that, you know, the total amount of the damages affected by the error.

Now, if I'm getting reversed and I want to salvage things by an affirmance, I would like to say, "I'll give you back a dollar." "I'll give you back a dollar. Affirm that's all that the legal error taints or affects."

Now, of course, the opponent, my opponent,

is going to have in mind a different number. Okay? Going to have a different number in mind than a dollar. So the way this is conceptually meant to work is the one who wants to buy an affirmance suggests a remittitur or offers a remittitur of an amount that that party thinks is the amount that will cure the error and wants the court of appeals to agree with that.

Look at the last sentence in the current rule. "If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error then the remittitur must be accepted and the trial court judgment affirmed."

Okay. Now, what happened in the current draft of the appellate rules is that the words "such amount" were interpreted to mean the amount that the court of appeals determined already should not have been awarded by the judgment. See, and that's getting the cart before the horse, because the court of appeals won't make that determination in this kind of a case before the losing party makes the offer to buy an affirmance. Okay. So that's the first thing.

The current rule is misdrafted. It misperceives the purpose behind the voluntary remittitur practice, and it needs to be changed. Now, this is not something that the TRAP subcommittee has, you know, agreed

with me on, because probably in the same manner as it appears to you when I speak at this committee on a number of occasions, I was puzzled about why it's worded the way it's worded now; and my detective work reflects that in my view a mistake was made when the '96 rules replaced the language in Rule 85. So that's the first thing.

The second thing is what was raised by one of the appellate specialists, is how do you do this? How do I do this if I have to move for rehearing? Okay. In order to make a complaint about the legal error, you know, how mechanically do I make this voluntary remittitur at the same time I'm moving for rehearing? I think at a former meeting of the -- of a smaller group of the members of the TRAP subcommittee and at the larger meeting we concluded that you do it or you can do it in the motion for rehearing.

My language is shown at the top of page three of this memo. "A motion for rehearing may include a conditional request for acceptance by the court of appeals of a voluntary remittitur and an affirmance of the trial court's judgment as reduced by the remittitur without waiving the movant's complaint that the court of appeals erred in ruling that a reversible error was committed in the court below," and I'm saying as my first point is there wasn't -- as the appellant, "This should be

affirmed. There was no such error."

Okay. My back-up position is, "Will you accept the voluntary remittitur of a dollar," or whatever, "because assuming that there was such an error, that cures the taint of the error and calls for an affirmance," but the court of appeals would have to agree with that proposal before they would affirm. And, you know, I may be not clear enough, but I think that's what we need to do to the voluntary remittitur provision.

Another thing to do to it would be just to eliminate it. I've only come across this once in my nearly 30 years of appellate practice, and my argument was that Jim Cronzer's request for remittitur was too small. Okay. Too small. That his client needed to remit considerably more than that, so that's a pretty problematic endeavor altogether.

CHAIRMAN BABCOCK: So you move this, I assume.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: And seconded by anybody?

MR. SOULES: Second.

CHAIRMAN BABCOCK: All right. Discussion about this? Judge Patterson.

HONORABLE JAN PATTERSON: I have a question, Bill. On the first paragraph is the difference between

those two languages -- am I right that you're suggesting that the timing is such that the old language is not an accurate reflection of what the court of appeals can do at that time or determine, and that's a different question than the measure of damages?

You're not suggesting that the total amount is necessarily a different measure of damages. You're just correcting the language and what the court of appeals can do at that point; is that correct?

PROFESSOR DORSANEO: Yes. It's timing. In 46.3 --

HONORABLE JAN PATTERSON: Okay.

PROFESSOR DORSANEO: -- you deal with the more normal situation that people would be thinking about.

HONORABLE JAN PATTERSON: Right.

PROFESSOR DORSANEO: Where the court of appeals is suggesting a remittitur.

HONORABLE JAN PATTERSON: And my only concern is that it's such a subtle change, and to me "total amount" is going to be interpreted as a different measure and a larger amount than the old language, and there's going to be greater significance attributed to the use of that language.

PROFESSOR DORSANEO: I put "total" in there because I think that's what -- I don't think it's

necessary to say "total."

MR. YELENOSKY: Right.

PROFESSOR DORSANEO: I put "total" in there to make it clearer, not to make it less clear.

MR. YELENOSKY: That was my question, why is "total" in there, because the amount by itself when it's qualified by damages affected by the error is sufficient to solve the problem identified.

PROFESSOR DORSANEO: I would be willing to take "total" out. Appellate lawyers at least understand why I put it in there, right, Mike?

HONORABLE JAN PATTERSON: Right, but that could be the comment.

MR. HATCHELL: I have a philosophical difference on that point. I don't believe, frankly, that -- I think you have to be able to identify the maximum taint of an error.

PROFESSOR DORSANEO: That's what "total" is meant to mean, "maximum taint."

MR. HATCHELL: When error taints a damage element I think the entire element comes out. I don't think the parties can begin to say, "Well, it wasn't a real bad error, so it only touches 75 percent of this element." If we are suggesting by taking the word "total" out that somehow or another you can say that, "Well, this

was kind of a 75 percent error" --

MR. YELENOSKY: That goes to how you define "affected." "Total" doesn't help you there, in my opinion. I mean, it's like the word we were arguing for "such" and "same."

PROFESSOR DORSANEO: Let's take "total" out. "Total" causes more trouble than it helps.

MR. YELENOSKY: If the concern is trying to define what's affected and then figure out what that amount is, then you need some more verbiage added.

CHAIRMAN BABCOCK: Justice Hecht had a comment.

MR. SOULES: Mike, what if we --

CHAIRMAN BABCOCK: Luke.

MR. SOULES: -- take out "total" and say "amount of the element of damages"?

CHAIRMAN BABCOCK: Luke, Justice Hecht wanted to say something.

MR. SOULES: Oh, pardon me, sir.

JUSTICE HECHT: When you change the first paragraph, I see the point about the word "determine," but shouldn't it just be changed to "determines"? Because if you change it the way you've got it, it looks to me like you suggest the possibility that the party may come in on the motion for rehearing and say, "We voluntarily remit a

dollar"; and the other side will respond and say, "No, you've got to remit at least $100,000 to solve the problem"; and the court of appeals says, "Well, it's not a dollar. It's not $100,000. It's $50,000, and so the motion is denied," even though the movant might then say, "Well, hang on just a second. Then we will remit 50,000, if that's what the court of appeals determines."

If you're buying an affirmance and you guess wrong or your position is wrong and the court of appeals takes the position -- decides that the taint really extends this far, it seems to me that the party who is moving to remit ought to get to respond to that and say, "Okay, that's what we'll do," or is that under -- does that fall back under 46.3?

PROFESSOR DORSANEO: Well, I tuned out right before you made the last comment because I was thinking about the first part.

JUSTICE HECHT: Movant says, "A dollar." The person responding says "$100,000." The court of appeals writes on the motion and says, "50,000. Motion denied." So then can you move under 46.3 that the court has now suggested the remittitur of 50,000, or I don't know where that leaves you on the timing.

PROFESSOR DORSANEO: Uh-huh. Well, here's what I think about the main point, that to change

"determine" to "determines" would be a great improvement. Right? But I think the last sentence of the current rule, which is taken from the predecessor rule nearly verbatim, you know, makes it clear that the court of appeals determines whether to accept the voluntary remittitur. That's really what's going on in the process.

JUSTICE HECHT: But the question I'm raising is suppose the court of appeals says, "No, that's not enough. This would be enough." Then does the --

PROFESSOR DORSANEO: Then I think maybe you are back in -- then I think you are in 46.3.

CHAIRMAN BABCOCK: But you have a timing problem under 46.3 because it says "if the remittitur is timely filed," and what if the court's suggestion coming in response to your 46.5 remittitur makes any further action by the appellee untimely?

PROFESSOR DORSANEO: Well, 46.3 says, "The court of appeals may suggest a remittitur," and then it says "if the remittitur is timely filed." Now, what does that mean "if the remittitur" -- I mean, I'm asking now.

CHAIRMAN BABCOCK: That's my question. You're supposed to have the answers.

PROFESSOR DORSANEO: Well, I had a lot of answers, and I had a lot more knowledge about this at some earlier point in time, but I think right now that that

means that the court of appeals, you know, suggests a remittitur and then, you know, it has to be timely filed after the suggestion. Not there's some abstract, you know, or specific time period that's required as is the case in 46.5. Huh?

Now, you see, the mechanics of this, what we're doing, we're taking the mechanics of this and we're working it further than anybody has worked them before.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Huh? And, you know, Justice Hecht asked me what happens if the court of appeals says not only that that's not enough, but this is enough, then what do we do next? Well, pretty obviously, you accept that suggestion or you don't.

PROFESSOR CARLSON: Right.

PROFESSOR DORSANEO: Okay. And I think that that would mean that you're back to 46.3, although I never thought about 46.3 as being the back end of 46.5 practice. Huh? Never thought of it that way.

CHAIRMAN BABCOCK: But here's the question.

PROFESSOR DORSANEO: But the bottomline is I think on this voluntary remit the amount, I don't -- I think we have several options. I clearly don't like the current language. It would be better to say that "the court of appeals determines," but I don't like that as

well as my proposal, "voluntary remit the amount" -- forgot "total" -- "of the damages affected by the error." I might, in fact, prefer it to be more parallel with the language in the last sentence. "The amount" --

MR. YELENOSKY: "That will cure the reversible error."

PROFESSOR DORSANEO: Yes.

MR. YELENOSKY: "Cure the error."

PROFESSOR DORSANEO: Yes, "that will cure the reversible error," okay, which might be best of all. Any of those would be better than what it says now.

MR. YELENOSKY: What you just suggested is really what happens, right? I mean, because whether or not it's the amount of damages affected, if you remit what the court of appeals later determines cures the reversible error then you have met your burden.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: But wasn't Justice Hecht raising a timing issue, because the court of appeals original judgment does not have a suggestion pursuant to 46.3. It's silent on that. So then you come back and you say, "Okay, as the appellee, we'll remit $50,000," and then the court comes back pursuant to 46.3 and says, "No, 50,000 won't do it, but a hundred will." Do you then have time -- in other words, could the court of appeals say,

"If you give us a hundred within 15 days then everything is great"? Then they do that. Would that be timely? Would everything be timely in that fashion?

In other words, can the court of appeals set its own time schedule on that?

PROFESSOR DORSANEO: Why not?

CHAIRMAN BABCOCK: I don't know.

PROFESSOR DORSANEO: Why not?

CHAIRMAN BABCOCK: Could the court of appeals say, "Let us know in 60 days"?

JUSTICE HECHT: That's the question.

CHAIRMAN BABCOCK: That is the question Justice Hecht is raising.

JUSTICE HECHT: Uh-huh. Yeah.

PROFESSOR DORSANEO: All right.

JUSTICE HECHT: I see your timing concern on paragraph (1), but it seems to me the change then suggests that if the movant guesses wrong he's out.

PROFESSOR DORSANEO: Oh, I hope not.

JUSTICE HECHT: That's what I thought. I hope not, too.

PROFESSOR DORSANEO: Are we back to the drawing board, work on this some more?

CHAIRMAN BABCOCK: I'd accept that.

PROFESSOR DORSANEO: I'm reluctant to not

finish this up because it's wrong now.

CHAIRMAN BABCOCK: Yeah. Well, it seems to me it needs some more drafting and better than we can do with 40 people in the room.

MR. JEFFERSON: How does the court of appeals normally suggest the remittitur? Is it in the opinion?

MR. HATCHELL: Yeah.

MR. JEFFERSON: In other words, so if they do it a second time saying 100,000 or 50,000 would be enough, wouldn't that -- you know, then you have rights of rehearing under the rules.

MS. BARON: You start over.

MR. JEFFERSON: Why would you be facing a timing issue?

PROFESSOR DORSANEO: I don't see the timing issue myself. You know, I don't understand how it could be a problem.

CHAIRMAN BABCOCK: Yeah, because the proposed amendment here suggests that there's going to be a voluntary remittitur within the time period for filing a motion for rehearing. Right, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Okay. And so then it would be the court of appeals who would have -- still have

jurisdiction over the appeals because there's been a timely motion for rehearing coming back and saying, you know, "Your remittitur doesn't do it; however, pursuant to 46.3 we think that twice that would do it, and you've got 15 days or 10 days or 5 days to tell us whether you're going to accept that or not."

PROFESSOR DORSANEO: Do we have any appellate judges here that recall writing opinions on suggesting remittiturs? Isn't what you've done is to say that?

MR. EDWARDS: The ones they have done to me say, "We suggest you remit this, and if you don't do it then the case is reversed." That's what it says.

PROFESSOR DORSANEO: That's my recollection, so why wouldn't that work? The only reason -- I guess if the court of appeals didn't think that it was supposed to do that --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- that could be a problem. Huh?

MR. EDWARDS: Is the problem solved by saying that "a voluntary remittitur is done by motion for rehearing," because by doing that the timetables are all in place?

CHAIRMAN BABCOCK: I think that's the effect

of what is happening.

MR. EDWARDS: I know, but if we say that --

CHAIRMAN BABCOCK: Say it specifically.

MR. EDWARDS: We say it in the second paragraph but not in the first part or first paragraph, or we put in here somewhere that a voluntary remittitur is to be treated as a motion for rehearing.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: To go directly to that point, I think including this in a motion for rehearing is a really bad idea.

MR. TIPPS: Can't hear down here.

HONORABLE SARAH DUNCAN: I think it's a really bad idea to include a voluntary remittitur in a motion for rehearing. If you want a voluntary remittitur to get the attention it should deserve, I think given how unusual it is, it better be in a document labeled "voluntary remittitur" and not just buried in a motion for rehearing; but aside from that, it seems to me that what we need to say is "The affected party can file" -- "can voluntarily remit the amount it believes will cure the reversible error" and then the court of appeals has the choice of either accepting that amount or suggesting a different amount under 46.3.

And there needs to be some type of time

period stated in 46.3. If the court suggests a remittitur, it must give the affected parties ten days to either voluntarily remit that amount or refuse to do so; but the time period, it seems to me, needs to be under 46.3, which at this point only says "timely." But it ought to be a circular -- there ought to be the possibility of a circle, because I don't think there are very many court of appeals opinions that suggest a remittitur.

The chance is more likely that that's going to come from the affected party, and so there ought to be a way for the affected party to say, "Court, we think this is the amount you should suggest" and give the court an opportunity to come back and either accept that amount, propose a different amount, or say, "No, we can't divide, we can't make a determination as to the amount of damages this error affected."

CHAIRMAN BABCOCK: Luke and then Elaine.

MR. SOULES: I think Justice Duncan's point on strategy is correct that perhaps we should provide for there to be a separate -- at least available, a separate way to present this other than a motion for rehearing, but I think we ought to permit it to be filed in a motion for rehearing if that's what somebody wants to do.

That said, if we put into 46.5 that "the

motion for rehearing" or some separate document, however we write that, "may include a conditional credit accepted by the court of appeals on a voluntary remittitur or, alternatively, a request for the court to suggest a remittitur under 46.3," then that at least suggests to the Bar that if they are going to ante to the appellee -- if the appellee is going to ante, that it may be a good idea to also ask the court alternatively to set his own number under 46.3 if it disagrees. Of course, that doesn't affect the last sentence of the rule as written here because if the court of appeals accepts it, it's a done deal; but at least alternatively there it asks to set a number if they disagree.

So what I'm suggesting is that after the second line of the underscored language in the second paragraph, "appeals of a voluntary remittitur or alternatively to suggest a remittitur under" -- "request that the court of appeals suggest a remittitur under 46.3."

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I think putting it in a motion for rehearing makes logical sense for the reason that you suggested. I still think this is error, but if you don't then this number. By allowing the alternative, I guess if you allowed an alternative way to suggest than

the motion for rehearing and plenary power plays off the motion for rehearing, then I guess TRAP 19 would have to do on exceptions on what the court could do.

PROFESSOR DORSANEO: The cheap and dirty timing fix problem is to say that you can include it in the motion for rehearing, because that was the original concern of the lawyer who wondered, "How am I supposed to do this in light of the fact that I've got this motion for rehearing timetable" and to some of us, at least, the simple answer was, "Well, why don't you just put that in there and the timing inconsistency problem will go away?"

To say that it's buried in a motion for rehearing, I get to write the motion for rehearing that I'm writing; and, trust me, the one that I write will not bury this. It will be perfectly clear that this is what I'm after, and that's entirely up to me how I want to, you know, make that presentation. So I am not really worried about that.

CHAIRMAN BABCOCK: What about Luke's suggestion that you add some language that's sort of suggestive to the court of appeals that they can come up with their own number if they want?

MR. SOULES: This is trying to address what Justice Hecht --

PROFESSOR DORSANEO: Yeah.

MR. SOULES: -- observed, and is this a drop-dead thing, you suggest your remittitur and if it doesn't fly, you're dead? Why not alternatively ask the court if they don't agree to set their number, and then you have got a process going? That was really my -- the nexus of my point.

CHAIRMAN BABCOCK: And Elaine's point is if you don't include it in a motion for rehearing then maybe the court is going to lose jurisdiction at some point without having done something. That's what I took her point to be, but maybe it's not.

PROFESSOR DORSANEO: I think Justice Hecht's suggestion, really what it boils down to to me, is the last sentence in the current rule is not sufficient to say what the court of appeals is meant to do when it gets one of these animals.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And I think I agree with that 100 percent.

CHAIRMAN BABCOCK: Judge Patterson had something, then Steve.

HONORABLE JAN PATTERSON: I agree with that, too, but I actually like the rule the way it's written with the exception of the word "total," because I think it doesn't say that a motion for rehearing is the

exclusive --

PROFESSOR DORSANEO: No, it doesn't.

HONORABLE JAN PATTERSON: -- vehicle. It says it may, but it also seems to me that it's the logical place for it to belong; and I think this rule, the way it's written, generally has the great value of simplicity to address a flexible concept that is not used that often; and why come up with something more specific in a timetable for something that does lend itself to a flexible back and forth between the parties and the court?

CHAIRMAN BABCOCK: Now Steve, then Bill.

MR. YELENOSKY: I guess I'd prefer something that directs the court of appeals as to what ought to happen to Luke's suggestion because with Luke's suggestion it seems to me that everybody in the know, the Bill Dorsaneos, will always put with their remittiturs a request that the court of appeals set the number if this isn't right. Because if it's off by one dollar and you haven't requested that and the court of appeals doesn't do anything, then isn't it a gotcha? And why do we want to write in a gotcha that says, "Oh, yeah, you can ask the court to set the number."

HONORABLE JAN PATTERSON: "And for such other relief as may be" --

MR. YELENOSKY: Because if it's permissive

that you do that, it becomes almost necessary that you do that and then why don't we just tell the court of appeals, "When you have remittitur and it's not right, tell them what is right" so we don't have that gotcha?

PROFESSOR CARLSON: Bill, is this akin to a factual sufficiency determination? Is it something that is final at the court of appeals? Does the court of appeals have to find? Does the court of appeals have to find the number you have, and if they do, are you done?

PROFESSOR DORSANEO: I don't think it's -- I'm not sure I can answer whether it's strictly legal or factual. I think it's legal. Okay. This is the -- you know, as a matter of law --

PROFESSOR CARLSON: Okay.

PROFESSOR DORSANEO: -- this amount will eliminate what Mike referred to as the maximum taint, right? It's such an arcane thing I'd almost be just as happy to take it out of the rule book altogether, but if it's going to be in there, somebody needs to have a fair shot at understanding it.

CHAIRMAN BABCOCK: Okay. Well, what -- yeah, Nina.

MS. CORTELL: I agree generally with the concept, and I don't know if you've already agreed to change this, but "affected by the error" as the standard

bothers me. It's just too unclear. In the first paragraph. And it's been suggested "the amount necessary to cure the error" or whatever, but "affected by the error," I just think is -- is too much --

PROFESSOR DORSANEO: I would, actually, after listening to all of the discussion, want to change that to "the amount" -- not "total amount" -- "that the affected party believes will cure the reversible error," which was Justice Duncan's language on that part of it.

MS. CORTELL: Okay.

HONORABLE SARAH DUNCAN: Then tell the court what it's supposed to do. You can either accept, suggest a different amount, or hold that remittitur isn't appropriate.

CHAIRMAN BABCOCK: So how would you change that language then, Bill?

PROFESSOR DORSANEO: In the first part, the amount --

CHAIRMAN BABCOCK: First paragraph, you're talking about?

PROFESSOR DORSANEO: Take out the word "total" from the draft and replace the suggested language in the draft "of the damages affected by the error," replace that with "the amount" --

MR. YELENOSKY: "That the party believes."

PROFESSOR DORSANEO: "The affected party," using the same language as in the third line, "believes will cure the reversible error." And that really matches the language in the last sentence, in the existing last sentence, and makes those two fit together.

The addition of an additional sentence or some additional language about what the court of appeals does to me is a distinct problem that may need to be worked on, but I don't have a sentence for that right now and don't know whether we need to do everything in order to do something.

CHAIRMAN BABCOCK: Okay. So that brings us to do you want to get back with your subcommittee and study this some more, or do you want to try to come up with some language right now? Or on a break?

PROFESSOR DORSANEO: You tell me what you want me to do.

CHAIRMAN BABCOCK: Well, I tell you, this is the last rule of the TRAP rules that we're on, right?

PROFESSOR DORSANEO: Well, we have more.

MR. GRIESEL: We have 42.

PROFESSOR DORSANEO: I don't think based upon all the correspondence we're getting from the courts of appeals and from other sources that we're going to run out of TRAP rules.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: I think the Court just needs to decide or Justice Hecht needs to decide when we have done enough of them --

CHAIRMAN BABCOCK: To send them along?

PROFESSOR DORSANEO: -- to send them along.

CHAIRMAN BABCOCK: Okay. Well, I think we're pretty close to our morning break time right now, Bill.

MR. EDWARDS: It seems to me we ought to have something in there that the filing of a voluntary remittitur, whether you call it a motion for rehearing or not, ought to be treated for timetable purposes like a motion for rehearing because it's going to go in the regular order of things in the court of appeals, and it may not get to the top of the pile before the time runs out.

CHAIRMAN BABCOCK: Okay. I mean, if no motion for rehearing is filed then 60 days can run and this thing isn't ruled on, then you're out of luck.

MR. EDWARDS: Unless you treat it for timetable --

CHAIRMAN BABCOCK: Right.

MR. EDWARDS: -- purposes like a motion for rehearing.

CHAIRMAN BABCOCK: Right. That's right.

MR. WATSON: I agree with Bill. That was sort of the original thing that came before us, and that's the quick and clean and easy fix, and I've actually seen that happen where a motion for remittitur was filed and everyone was twiddling their thumbs because the motion for rehearing came in, and you don't know what's going to happen. To me that is an easy, quick, clean fix.

CHAIRMAN BABCOCK: Yeah. Okay. Well, why don't we take our morning break?

Bill, if you can -- you and your group can come up with language that you want us to consider, we'll do it. Otherwise, we'll go to TRAP Rule 42.

Okay. So we'll be in recess for about ten minutes.

(Recess from 10:12 a.m. to 10:27 a.m.)

CHAIRMAN BABCOCK: Let's go back on the record. Bill, did you have a sentence for this thing, or should we refer it back to your subcommittee?

PROFESSOR DORSANEO: Pardon me, Mr. Chairman. Yes, I do have a sentence to add to the second paragraph that takes a stab or makes the effort to talk about what is not explained, and it goes like this, and it would be after the proposed sentence and the existing sentence.

"If the court of appeals determines that the request for voluntary remittitur is not sufficient but that remittitur is appropriate to cure the reversible error, the court must suggest a different amount under subdivision 46.3."

Now, we could say "may" rather than "must suggest a different amount under subdivision 46.3," and we could move the language -- move the words "to cure the reversible error" to after "is not sufficient to cure the reversible error but that remittitur is appropriate," if you prefer; but the idea of this sentence would be if that doesn't work then you loop back around to 46.3, which, as you pointed out, doesn't have a timing problem because it leaves the timing question to the court.

CHAIRMAN BABCOCK: Okay. How does everybody feel about that?

MR. LATTING: Are you going to say "may" or "must"?

HONORABLE SARAH DUNCAN: "May."

MR. SOULES: If it's "may" it's okay. If it's "must" -- if the court may decide that's part of the error but we really think this case ought to be tried again, you know, just gut feeling it ought to be tried again, I don't think they ought to have to be forced to give remittitur.

CHAIRMAN BABCOCK: Is "may" all right with you?

PROFESSOR DORSANEO: "May" is fine.

CHAIRMAN BABCOCK: "May" is fine with you. Steve.

MR. YELENOSKY: Well, the conditional clause before that is that -- didn't you say "if the court finds that remittitur is appropriate"?

CHAIRMAN BABCOCK: "Not sufficient."

MR. YELENOSKY: Well, I mean, the court needs to have the opportunity to determine, as Luke says, that it's not appropriate, that no amount is appropriate, right? But if the court determines that an amount is appropriate, it ought to say what that is; and that's what I thought "must" was intended to do and to eliminate any kind of disparity between courts of appeals where one will hide the ball and another one will tell you what you need to pay.

CHAIRMAN BABCOCK: Hatchell, what do you think about the "may"/"must" debate here?

MR. HATCHELL: I think that the case law has been that the party has a right to make this --

PROFESSOR DORSANEO: Yes.

MR. HATCHELL: -- remittitur and cure the error if possible. Now, you get into all kinds of

arguments as to whether or not it's even possible, so I think "must" is probably appropriate.

CHAIRMAN BABCOCK: I'm sorry. You've got to speak up.

MR. HATCHELL: I think "must" might be appropriate in accordance with the case law.

PROFESSOR DORSANEO: I'm going back to "must." I think I agree with Mike that "must" -- if it's appropriate --

MR. GILSTRAP: Yeah.

PROFESSOR DORSANEO: -- they must.

MR. LATTING: Sounds to me like --

CHAIRMAN BABCOCK: Okay. Judge Brister, how do you feel about this?

HONORABLE SCOTT BRISTER: Don't know enough about it yet to tell.

CHAIRMAN BABCOCK: Judge Duncan, you were a "may" person?

HONORABLE SARAH DUNCAN: No. If remittitur is appropriate I'm a "must" person.

CHAIRMAN BABCOCK: "Must," okay.

MR. WATSON: Can it be read again?

CHAIRMAN BABCOCK: Read it again, Bill.

PROFESSOR DORSANEO: "If the court of appeals determines that the request for voluntary

remittitur is not sufficient to cure the reversible error but that remittitur is appropriate, the court must suggest a different amount under subdivision 46.3."

MR. WATSON: Somehow "a different amount" doesn't -- I mean, it sounds sort of like putting numbers in a hat and pull it out. Could it be "the appropriate amount" or "proper amount" or --

MR. LATTING: That's implicit, isn't it, that we wouldn't give an improper amount?

MR. WATSON: I don't know. Just "a different amount" is --

PROFESSOR DORSANEO: I didn't say anything about "a different amount."

CHAIRMAN BABCOCK: Yeah, you did. "A different amount under Rule 46.3."

MR. TIPPS: "The proper amount."

MR. WATSON: Can't we say "proper"?

MR. LATTING: What about "proper amount"? That's okay.

MR. YELENOSKY: "The sufficient amount."

PROFESSOR DORSANEO: Okay. Just say "must suggest a remittitur under subdivision 46.3."

HONORABLE SARAH DUNCAN: That will be okay.

MR. LATTING: That will be fine.

CHAIRMAN BABCOCK: Okay.

MR. LATTING: Yeah.

CHAIRMAN BABCOCK: All right. Bill.

MR. EDWARDS: It seems to me that the last sentence of the second paragraph is better placed after the first paragraph and that the rest of that last paragraph go after the -- at the end of the entire thing, after what Bill has just suggested.

PROFESSOR DORSANEO: I agree with that.

MR. EDWARDS: And I would suggest that another paragraph be inserted before that "a motion for rehearing may include" to say something like "any voluntary remittitur not filed as a part of a motion for rehearing shall be treated as a motion for rehearing for appellate timetable purposes."

CHAIRMAN BABCOCK: What do you think about that, Bill?

PROFESSOR DORSANEO: I don't have a great deal of hostility to that. I don't want to write it down because I don't think it's necessary, and I don't -- this one appellate lawyer doesn't -- is sufficiently comfortable with putting it in a motion for rehearing and putting it all in one document, which is what I think I would do.

MR. EDWARDS: Well, if that's the case, let's just say that it's filed as a part of a motion for

rehearing, because the first paragraph here talks about something that's not a motion for rehearing that's hanging out in limbo as far as timetables goes, to me.

PROFESSOR DORSANEO: Well, that's what the last part is meant to do. It's meant to say how you do this, okay, rather than what the current rule does provide, which is kind of an open question as to whether you're in limbo or part of the rehearing process.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: I hate to disagree with Justice Duncan on this, but I think this document or this plea is a natural part of a motion for rehearing, because what's happened is the court of appeals has reversed and remanded, and you're asking them to change the judgment, and so I think it has to be in a motion for rehearing. I just don't think it ought to be anywhere else.

PROFESSOR DORSANEO: I agree with Mike. Because if we say it's in something else then I don't know what that something else is or whether that's the equivalent of a motion for rehearing or how it all works and if we have to create a whole new universe of rules to deal with it.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: We're saying, though, that a motion for rehearing "may include." I think it should be

that "a conditional remittitur shall be included in." I mean --

CHAIRMAN BABCOCK: I think that's the position we're working toward. Yeah.

PROFESSOR DORSANEO: See, but for me, if somebody filed -- if you filed one separately and you filed a motion for rehearing and if I was reading it, I would treat it as part of the motion for rehearing.

MR. EDWARDS: Well, I think that first paragraph invites somebody that's not skilled in the TRAP rules to just file something they call a remittitur and then you have an argument is it a motion for rehearing or not, and when does the --

CHAIRMAN BABCOCK: Right. That's the problem I see, is that there is no motion for rehearing filed at all. Somebody just files this pleading, and all of the sudden 60 days goes by and then there's an argument that the court has lost jurisdiction. You know, why get into that?

PROFESSOR DORSANEO: I'll accept Bill Edwards' suggestion then.

CHAIRMAN BABCOCK: All right. Here's what we're going to do. I think we have a pretty good consensus about what ought to be in this rule, but there's so much language that's been going on. Bill, you go back,

and I don't think you need to run it by your subcommittee, but get the language that we've all agreed on, and we'll get that resolved at our next meeting. So why don't you go to rule --

PROFESSOR DORSANEO: I'm finished with my talking.

CHAIRMAN BABCOCK: You're done. Okay. Good. Pam, let's quickly go to your report on --

HONORABLE SARAH DUNCAN: What about 42?

MS. BARON: Can we do Rule 42 first?

PROFESSOR DORSANEO: Yeah, 42, Pam.

CHAIRMAN BABCOCK: Pam, go to Rule 42.

MS. BARON: Right.

PROFESSOR DORSANEO: Does everybody have -- do you have a draft of this?

MS. BARON: That was faxed out to everybody on the 11th of January from Chip's office. It's entitled "Changes to TRAP Rule 42. Rule 42, dismissal settlement."

This was referred back to committee. I guess we had promised to study it and had not yet reported it back to this committee. We had a number of comments that came in from various private litigants and also court of appeals staff attorneys and judges asking that we clarify the power of the courts of appeals to act in accordance with a settlement agreement of the parties.

The Supreme Court has a special rule -- I think it's Rule 56.3 -- that does address settlement, but there is really not as clear or similar a rule that applies to the courts of appeals, and some of the problems that were encountered is that the only place agreements of the parties with respect to disposition is mentioned was in Rule 42.1, which was entitled "Voluntary Dismissal," and there was an argument that the only action a court of appeals could take in responding to an agreement of the parties would be to dismiss and not to set aside a judgment and send it back to the trial court for further proceedings.

So what we sought to do was to clarify in some way and to parallel the existing rule applicable to the Supreme Court proceedings to make clear the kinds of actions the court of appeals could take. We also had some concerns raised that some courts of appeals, if parties came in and announced that the case had settled but did not condition settlement on sending the case back to the trial court, the court of appeals would determine that the case was moot, and not only the appeal needed to be dismissed, but the entire cause vacated, which had the effect of pulling the trial court's judgment out from under the rug of the settlement that the parties had made.

There were other concerns that if the party

did not come in and indicate how costs should be allocated in connection with a settlement then the courts of appeals had to go back and ask them to file further motions. There were some questions about whether the court could take action before submission, because the disposition rule in 43 is premised on a submission first before judgment.

So we tried to take care of all of this by distinguishing between voluntary dismissal and then a series of actions that the court could take in connection with a settlement. So we've changed Rule 42.1(b) to add a section called "Settled Cases," which would apply to the court of appeals and to provide actually a default disposition if the parties come in with a motion that just says, "We've settled. Please do something," that in that case the court would dismiss the appeal but not vacate the entire cause and the trial court's judgment and then saying, "but if otherwise requested, the court can take a series of different actions," including rendering the judgment that effectuates the agreement, setting aside the trial court's judgment and sending it back to the trial court for rendition of judgment in accordance with the agreement of the parties, or just to abate and send it back, for example, in situations where the settlement would require a fairness hearing or involved a minor and

there may be a factual hearing that would be necessary in order for the trial court to actually approve the settlement before either the trial court or the court of appeals could render a judgment that effectuated the settlement.

We've left the same provision on an effective opinion, which means that the parties can't buy away a court of appeals opinion and the court would make its own decision on whether an opinion would or would not be withdrawn in connection with disposition based on a settlement; and, finally, we have added a default provision on costs which says that if nobody says anything, we're just going to tax them against the appellant; and, finally, we have added a comment, which should have been underlined, and I apologize, to make clear that this case is -- the changes are intended to override this older line of cases that suggest that the whole cause has to be dismissed merely because the parties have settled their dispute on appeal.

CHAIRMAN BABCOCK: Yeah, Luke.

MR. SOULES: The way I read this, if it goes back to the trial court, it goes back to the trial court judge and it's vacated, and we've just had to struggle through the rules in a case involving a minor where the case is pending before the Fourth Court, and I think it's

42.1. Anyway, we tried to work our way through to see, and I think there is some language about the court can take whatever is necessary to process what was necessary to effectuate the settlement.

I think there needs to be a broad power in a settlement context for the court of appeals to remand whatever the court of appeals needs done to the trial court and let the trial court do it and then certify back. In this case the plaintiff was certainly not willing for the trial court -- for the court of appeals to vacate the judgment, at all. The trial court said, "I don't have jurisdiction to entertain a fairness issue or an annuity issue or even the attorneys fees issues, and so I can't do a thing," and we really couldn't find a specific authority where the court of appeals could remand in those circumstances. Sometimes they remand just on attorneys fees, sometimes they remand for cost, sometimes they remand for findings of fact and conclusions of law not in the context of settlement. So they do -- the court of appeals does remand back to the trial court when it's necessary to get some more information in order for the court of appeals to go forward. In this case, and what we're talking about here, is in order for the court of appeals to go forward with the settlement.

There needs to be authority in the rules for

the court of appeals to remand to the trial court to get whatever the court of appeals may need done done to proceed with the settlement, and a minor case is not going to be the only context. This happens to be an extremely important case. It's big numbers, and -- but it's not unique, and we've struggled with exactly what we could do. Both sides want to get it over with, but the plaintiff won't let the trial judgment be vacated, and the defendant won't allow the appeals to be dismissed because we've got to go have a hearing in front of the trial judge to find out if the settlement is going to be approved. So we're stuck, except I think we have got it fixed, but --

MR. EDWARDS: Doesn't (b)(2)(3) take care of it? I mean (b)(2)(c).

MR. SOULES: (b)(2)(c)?

MR. EDWARDS: Yeah.

MR. SOULES: It says "may include setting aside the judgment without regard to the merits."

MS. SWEENEY: No, (c).

MS. BARON: (c).

MR. EDWARDS: (c).

MR. SOULES: (c)?

MR. EDWARDS: It says "abate the case to allow proceedings in the trial court to effectuate the agreement."

MS. CORTELL: Maybe another thing we could do is say "remand the case to the trial court for proceeding in accordance with the agreement."

MR. SOULES: Yes. That's something else, because everybody is comfortable in the court of appeals. I think "abate the case to allow proceedings in the trial court to effectuate the judgment" gets -- that's the concept, but we ought to specifically empower the court to remand.

MR. EDWARDS: Well, what this tells me is that if something happens on the way to the settlement down in the trial court, the appeal is still there.

MR. HATCHELL: Right.

CHAIRMAN BABCOCK: Right.

MR. EDWARDS: As for example, the guardian ad litem and the trial court say, "We ain't going to agree to that."

MR. SOULES: Yeah.

MR. EDWARDS: Or "That settlement stinks. No."

MR. SOULES: Right.

MR. EDWARDS: You're still in the court of appeals, but the court of appeals proceedings at this point in time are no longer abated and go forward.

MS. BARON: Right.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Luke, I think that if we remand that implies a reversal of the trial court's judgment --

MR. EDWARDS: Yeah.

MS. BARON: -- and that abatement is really what leaves the judgment intact but permits the trial court to go forward.

MR. SOULES: What do you do -- what is the action between the court of appeals and the trial court when the court of appeals wants findings of facts and conclusions of law? You can abate the appeal. That just stops it up there.

CHAIRMAN BABCOCK: Sarah wants to --

MR. SOULES: That doesn't trigger anything in the trial court. You've got to do something that triggers something in the trial court, and I think that's a remand or a partial remand.

CHAIRMAN BABCOCK: Hang on. Sarah wants to say something.

HONORABLE SARAH DUNCAN: If we remand, if the court of appeals remands, it loses jurisdiction during the period of remand. So what we do, and we frequently do it, for instance, in criminal cases, if we abate and direct the trial court to go forward with proceedings, the various hearings and findings and conclusions, whatever,

we retain jurisdiction over the cause and the parties. We just abate it to permit the trial court to conduct parallel proceedings. So I don't think you want us to remand it because then we lose jurisdiction over the parties and the cause, and what you want it to do is just to abate.

MR. SOULES: Your words effectuate --

HONORABLE SCOTT BRISTER: Can you refer rather than remand?

MR. EDWARDS: I was going to say instead of "allow" it would be "direct the trial court."

MR. SOULES: That's okay.

MR. EDWARDS: Instead of "allow," it's to "direct."

HONORABLE SARAH DUNCAN: That's fine.

PROFESSOR DORSANEO: And I think we want to abate the appeal, right?

MR. EDWARDS: You abate the appeal and direct the trial court.

PROFESSOR DORSANEO: The question that I would have is --

CHAIRMAN BABCOCK: Hold on. Is that okay, Pam?

MS. BARON: It is. We need to get the language.

CHAIRMAN BABCOCK: "To abate the appeal to direct proceedings."

HONORABLE SARAH DUNCAN: "And direct the trial court to conduct proceedings."

MS. CORTELL: I would say "and." "Abate the case and allow" or "and direct."

HONORABLE SCOTT BRISTER: "Abate the appeal."

MS. CORTELL: I'm sorry. "Abate the appeal."

MS. BARON: Okay. Let me try it. "Abate the appeal and direct the trial court to conduct proceedings to effectuate the agreement." Is that all right?

PROFESSOR DORSANEO: Yes, with one question.

MR. SOULES: I don't know whether that's all right. Because the trial court can't finalize me.

MR. HATCHELL: Right.

MR. SOULES: The court of appeals has to finalize my case, so this is talking about to effectuate the agreement. The trial court is not going to effectuate our agreement. The trial court is going to find that it's fair or not fair, and if we get it settled, the trial court is going to have to find -- make the settlement findings necessary in a minor case, but then that's going

to go back to the court of appeals, and that's where it effectuates.

HONORABLE SARAH DUNCAN: And that's what we're going to say in the abatement order, is "Trial court, conduct these proceedings and then certify your record, your findings, your conclusions," whatever, "back to us so that we can read your judgment in accordance with the parties' agreement."

MR. SOULES: That process needs to be articulated in this rule.

MS. BARON: All right. Let me try it again. "Abate the appeal and direct the trial court to conduct further proceedings necessary to effectuate the settlement."

MS. CORTELL: Or you could say "in accordance with." I mean, just keep your language from the (b).

MS. BARON: Well, I think Luke's point is it's necessary to effectuate the settlement. No?

MR. SOULES: That's probably all right. It's somewhat vague.

CHAIRMAN BABCOCK: Yeah, that sounds more -- Nina.

MR. SOULES: I think a trial court could effectuate the settlement if -- well, let's see.

MS. CORTELL: But not necessarily. I just think it ought to be broader, and it's the same language you've got in (b).

MS. BARON: Well, can you read what you have in mind because I'm not following you?

MS. CORTELL: "Abate the appeal and direct the trial court to conduct proceedings in accordance with the agreement."

MR. SOULES: I think the level of comfort of the parties in any situation such as this is going to be they want the trial court to do whatever is necessary to develop the record that the court of appeals needs to vacate the judgment --

CHAIRMAN BABCOCK: Okay.

MR. SOULES: -- and approve the settlement.

CHAIRMAN BABCOCK: The language that we have now -- Pam, check me on this -- is "abate the appeal and direct the trial court to conduct further proceedings in the trial court necessary to effectuate the agreement." Is that what you have?

MS. BARON: No, but that's okay.

CHAIRMAN BABCOCK: Well, tell me what you have.

MS. BARON: I have "abate the appeal and direct the trial court to conduct further proceedings

necessary to effectuate the settlement."

MR. SOULES: Say "necessary for the court of appeals to effectuate the settlement."

MR. GILSTRAP: Well, that assumes that effectuate is a single event, and it's not.

CHAIRMAN BABCOCK: Yeah. That's right.

MR. GILSTRAP: It's kind of a continuing event. That is an intentionally vague word.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: The only lingering concern I have here is that I suppose in some circumstances the trial court will say, "No, we're not going to do that, what you want done to effectuate the settlement." The trial court has some ability to -- limited ability, but some ability to say that that is against public policy or whatever, contrary to law, and we're not going to effectuate the settlement.

Maybe that's implicit in there. Maybe it doesn't need to be said, but it goes back to the trial court to see whether, you know, the settlement is going to be effectuated and then effectuate if the decision is made that the settlement should be effectuated.

MR. GILSTRAP: Bill, I don't think that's right. I think the court of appeals can tell them what to do and they can determine whether it's in accord with

public policy. I don't think they have to leave the trial court any discretion.

MR. HATCHELL: I have been through this a number of times, and the work that Pam has done on this is really very good, but everybody is just going to have to close their eyes and hope that it works. You have got two situations. The one identified by Luke is where you have a condition precedent to settlement such as the trial court's approval. It could be minors, workers comp, and what have you; and what we did in the Lemon case, if you remember, we did what you're allowing them to do.

You abate, send it back to the trial court. You get their approval or certification. It comes back up. The court of appeals then sends it back for entry of judgment in accordance with the agreement of the parties; and that's where the blind spot can occur because the court of appeals could potentially lose jurisdiction and by setting aside the judgment; and if the settlement falls through then you've got no appeal, you've got no judgment, and everybody is hurt.

What you have to -- I think the solution is that to say that if a settlement falls through at the trial court, that's a violation of a court of appeals mandate and the parties then move to the court of appeals to recall the mandate and reinstitute the appeal.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: There's already 56.3, and as Pam has pointed out, that covers this same exact subject in the Supreme Court. And, really, all it -- without trying to deal with all these problems, it just gives -- it is intended to give the Supreme Court the power to do basically whatever it takes under whatever circumstances are presented to get the job done, including holding the appeal, letting findings be made, not letting findings be made, vacating the judgments below, sending it back, directing a judgment to be rendered, remanding it for consideration. I mean, it's an empowerment rule, not a restrictive rule, and I wonder if we want to -- if we need any kind of a different provision for the court of appeals.

HONORABLE SARAH DUNCAN: Yes.

JUSTICE HECHT: We need a provision. Do we need a different one?

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I think what (2) does, (b)(2), does right now is to take 56.3 and just parse it into the three options that are provided there. And the question is how much clearer do we need to be about the abatement issue? It is vague as originally proposed here. That's exactly how it's written in 56.3 and --

PROFESSOR DORSANEO: The courts of appeals justices wanted it to be clear as to what the game plan called for and permitted.

MS. BARON: Well, I think they just want to make sure they have the power to do it. I think if you have the power to abate and send back for further proceedings to effectuate the agreement, that would include a fairness hearing, wouldn't it?

CHAIRMAN BABCOCK: Steve Tipps and then Elaine.

MR. TIPPS: I think this language that Pam's committee drafted is exactly what we need because it solves the only problem that we've identified, and that is a situation in which the parties have agreed to settle but work needs to be done that can only be done by the trial court and the ultimate issue is uncertain because it may or may not work out and you don't want the appellate court to lose jurisdiction.

And so what this rule says is that the way you achieve that goal is to let the appellate court abate the case so that it doesn't give up jurisdiction, and you send the parties back down to the trial court to do whatever it is that they need to do, and you don't direct anybody to do anything, and you don't make any final decisions about -- I think it's a mistake to try to tailor

this rule to some particular kind of settlement. I think you just want to get it back in the trial court where the parties can do whatever needs to be done to effectuate or attempt to effectuate that particular settlement.

CHAIRMAN BABCOCK: Elaine and then Justice Duncan.

PROFESSOR CARLSON: Pam, to address Luke's concern, was there some reason you didn't pick up the language in 56.3 that the court can abate the case until the lower court's proceedings to effectuate the agreement are complete? Because I think that was more the tenor of what Luke is suggesting.

MR. SOULES: Isn't that a Supreme Court rule?

PROFESSOR CARLSON: Right.

MR. SOULES: We're in the court of appeals.

PROFESSOR CARLSON: Well, I know, but why would we not use that similar language?

MR. SOULES: I'm sorry. I don't have my book in front of me. Read it again, please.

PROFESSOR CARLSON: I'll substitute. "The appellate court may abate the case until the lower court's proceedings to effectuate the agreement are complete."

MS. BARON: I think that language is fine. I don't think we changed it intentionally. I may just

think it was just to make clear that they could go do it.

PROFESSOR CARLSON: It just makes clear to Luke.

MS. BARON: Right.

CHAIRMAN BABCOCK: Justice Duncan, did you have something?

HONORABLE SARAH DUNCAN: I was going to agree with Stephen and point out the problem in cases like Luke's or Mike's --

CHAIRMAN BABCOCK: Speak up.

HONORABLE SARAH DUNCAN: It's not that we don't know -- that the court of appeals doesn't know how to abate a case, send it back to the trial court for further proceedings, including findings and conclusions. The problem has been we didn't have -- or some people thought we didn't have the power to do that. Once you say the court of appeals has the power to dismiss the appeal or to vacate and set aside the trial court's judgment and remand for further proceedings or to abate, I don't think you're going to find a problem with any court of appeals asking them to do what the particulars of their case require.

The problem has been that the court of appeals voluntary dismissal rule has been construed strictly by the courts' staff attorneys, at least, if not

the judges, and that they did not believe we had the power to do anything, any of these things. Once you give the court of appeals the power they can do whatever it is you ask them to do.

CHAIRMAN BABCOCK: Okay. The language that's on the table, "abate the appeal and direct the trial court to conduct further proceedings necessary to effectuate the agreement," is substantially the same as the language in 56.3. Is that sufficient for everybody?

MS. BARON: I think, Bill, do you have -- do you like Elaine's language better?

PROFESSOR DORSANEO: Well, I think it's up -- I think I'm almost quibbling on this small point, and I'm happy with either one. I may like Elaine's language better, but the work is so much better than the existing situation that I'm really ready to vote on it either way.

MS. BARON: Well, I'd kind of like to move to make this rule parallel with 56.3 just so that we have one rule that applies to all the appellate courts, and however it's interpreted by the Supreme Court would be the same way the courts of appeals would do it.

CHAIRMAN BABCOCK: Are you talking about only changing (b)(2)(c) or --

MS. BARON: Yeah. And let me read the

language. (c) would now say "abate the case" --

CHAIRMAN BABCOCK: "Abate the appeal"?

MS. BARON: I like "appeal" better, but "case" is what 56.3 says. "Abate the appeal until the lower court's proceedings to effectuate the agreement are complete," which does bring closure, as Elaine suggests, to the loop where it goes back down and then it comes back up and then the court of appeals moves forward in one way or the other, either with the appeal, if the settlement doesn't make, or to render a judgment or effectuate the agreement of the parties by disposing of the appeal.

CHAIRMAN BABCOCK: Okay. How does everybody feel about that? Is that okay?

MR. CHAPMAN: Can we hear it once again?

CHAIRMAN BABCOCK: "Abate the appeal until the lower court's proceedings to effectuate the agreement are complete."

Nina.

MS. CORTELL: I have no problem with that, but I do have a question on (2)(b), and it's the same nature of the issue, although it would make it inconsistent with 56.3, I'm afraid, but whether the remand should be limited to rendition of judgment, or like we're suggesting in (2)(c), it should be remanded to effectuate the agreement. In other words, some people may be willing

to let go of their appellate jurisdiction, come back down, but want to do more than just get judgment in accordance with the agreement.

MS. BARON: What would that be?

MS. CORTELL: Vacate findings, have other proceedings. I mean, I understand most people are going to go with (c), but maybe not always.

HONORABLE SCOTT BRISTER: Release a bond or funds in the registry of the court.

MS. CORTELL: Right.

CHAIRMAN BABCOCK: Well, (b) is almost verbatim with 56.3.

MS. CORTELL: I understand the problem.

CHAIRMAN BABCOCK: Okay. What else?

HONORABLE SARAH DUNCAN: And just to point out, you still have (a)(1)(a).

MS. SWEENEY: Still have what?

HONORABLE SARAH DUNCAN: (a)(1)(a). "In accordance with an agreement signed by all the parties or their attorneys and filed with the clerk."

CHAIRMAN BABCOCK: Yeah, okay. John.

MR. MARTIN: Under the first part there, "settle cases," (b), that third line that says "without submitting the case and considering the merits," well, I'm not sure why that needs to be in there. That sounds like

you can't settle it after the case has been submitted, but surely you can. In other words, what if you settle after the case has been submitted but no decision is reached yet or after the decision comes down?

MS. BARON: Well, that's certainly not what was intended. It was intended to give the court of appeals the power either before or after submission and before or after opinion.

MR. MARTIN: It just seems to me that ought to come out.

MS. SWEENEY: Why not say "without further proceeding"?

MR. EDWARDS: You just say "whether the court has submitted the case or considered the merits."

HONORABLE SARAH DUNCAN: Why don't you say "at any time"?

MR. EDWARDS: Or "at any time."

MS. BARON: That's fine.

HONORABLE SARAH DUNCAN: "At any time before judgment" -- I don't know if we want to limit it or just "any time."

MR. EDWARDS: Any time before it loses jurisdiction.

HONORABLE SARAH DUNCAN: I think "at any time the court of appeals has jurisdiction."

MS. BARON: Well, then "at any time" would do it.

MS. CORTELL: Can't you just take out the whole phrase?

MR. YELENOSKY: Yeah. Do we need to say it?

MS. BARON: Well, we have to say it because we had several comments from courts of appeals staff attorneys who said because this provision related to agreements of parties was in Rule 42 and not Rule 43, which provides for a final disposition of the case only after submission, or arguably only after submission, that if a settlement came in that the case would have to be submitted before the settlement agreement could be effectuated through judgment; and it's a dumb reading of Rule 43, so I don't know that we necessarily need to correct it.

What Rule 43 says is that "The judgment shall issue promptly after submission" or something to that effect, which suggests that you can't have a judgment without submission.

MR. YELENOSKY: Can't you just reply to their letter saying, "That's an incorrect interpretation of Rule 43"?

HONORABLE SARAH DUNCAN: I mean, you have to understand -- just put it in there, please.

MR. SOULES: Second.

CHAIRMAN BABCOCK: Hang on. What do you want to put in?

HONORABLE SARAH DUNCAN: "At any time."

MS. BARON: Where do you want to put that, Sarah?

HONORABLE SARAH DUNCAN: I don't care.

CHAIRMAN BABCOCK: "If a case is settled by agreement of the parties at any time"?

MR. TIPPS: No.

MS. BARON: No.

CHAIRMAN BABCOCK: Well, see.

HONORABLE SCOTT BRISTER: You would be able to find a place.

CHAIRMAN BABCOCK: Okay. Where do you want to put it then, those naysayers down there who didn't want to put it after "parties"?

MR. TIPPS: You need to put it under both (1) and (2).

MR. EDWARDS: Just take out "without submitting" and put in "at any time."

MR. WATSON: Yeah.

HONORABLE SARAH DUNCAN: How about "if at any time"?

MR. TIPPS: Yes.

HONORABLE SARAH DUNCAN: "A case is settled by agreement of the parties."

MR. TIPPS: Uh-huh. Uh-huh. That will work.

CHAIRMAN BABCOCK: All right. "If at any time a case is settled by agreement of the parties and all parties to the appeals move the appellate court to effectuate the agreement of the parties," comma --

MS. BARON: No, colon.

CHAIRMAN BABCOCK: Colon, sorry. After (1) should there be a connector like an "an" or an "or"?

MS. BARON: I guess so. "Or."

PROFESSOR DORSANEO: Very good, Mr. Chairman.

CHAIRMAN BABCOCK: I really earned my money today, didn't I? Okay. We've got that. Now what? Any other comments about this rule?

MR. GILSTRAP: I have one that's strictly stylistic and it's probably too late since the term "to effectuate" is already in Rule 56, but I had to look that up to make sure it was good usage, and it is, although it's kind of a low-brow version of "to effect." Anybody offended by that?

CHAIRMAN BABCOCK: It doesn't offend me. Anybody else? Any other comments?

MR. SOULES: I think we need to fix the problem that Mike is talking about where there's a -- perhaps there's a void in jurisdiction. We just need to write something that says the court of appeals retains the jurisdiction.

CHAIRMAN BABCOCK: Where did Mike go?

MR. SOULES: I don't know.

MR. MEADOWS: He had to leave.

MR. EDWARDS: He had to leave.

MS. BARON: I thought we had done that through (c), Luke, and maybe I'm missing some nuance here, but if the court of appeals abates the appeal until the trial court finishes all the stuff it needs to do, and then it comes back up, the appeal is still live. There's no question about that.

MR. WATSON: I think you've cured it.

MS. EADS: I think you've cured it.

CHAIRMAN BABCOCK: I think they were concerned about the lower courts having jurisdiction.

MS. BARON: Well, if the appellate court tells them to do it, are they going to say, "We can't"?

PROFESSOR DORSANEO: Well, you have "abate the appeal until the lower court's" --

MS. BARON: Right.

PROFESSOR DORSANEO: I think someone could

say --

MS. SWEENEY: "Abate the appeal and remand"?

PROFESSOR DORSANEO: -- that the lower courts have to be authorized and directed to --

MR. SOULES: Mike's talking about a different point in time, though. He's talking about, I think, after the court of appeals settles, deals with the settlement of the case, when it's remanded back to the trial court to effectuate the settlement.

MS. BARON: So you're talking about (b) where the judgment has been -- the judgment is gone?

MR. SOULES: Yes.

MS. BARON: And then the settlement goes south at that point?

MR. SOULES: Yes.

CHAIRMAN BABCOCK: But this presupposes the agreement has not gone south, that it's been --

MS. BARON: I think if you're worried about the settlement going south you need to do (c) and not (b).

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Right. Yeah. If the settlement is not complete then you're going to do (c). If the settlement is complete, everybody has signed off, it's all done, then you're going to do (b), and the court would certainly have jurisdiction to do that.

MR. EDWARDS: Does (c) give the trial court some kind of a revival of its plenary jurisdiction to some degree?

MR. SOULES: No. Limited jurisdiction. Not plenary.

MR. EDWARDS: But does it give jurisdiction?

MR. SOULES: To do what the court of appeals asked it to do.

CHAIRMAN BABCOCK: Is telling it to do, right.

MR. SOULES: I guess. I mean, it doesn't say that. See, that was my point earlier. They abate the appeal --

MR. JEFFERSON: That was one question I had.

MR. SOULES: -- so the trial court can proceed, but where's the trial court's authority to proceed?

MR. JEFFERSON: What's the source of the jurisdiction, and can the court of appeals recreate it back in the trial court? Maybe it can. I just --

MR. GILSTRAP: The source is the rule. The rule says it can.

MR. JEFFERSON: Is the rule sufficient?

MR. SOULES: But the rule doesn't say the trial court has jurisdiction.

MR. GILSTRAP: It says it can do it.

CHAIRMAN BABCOCK: Judge Brister.

HONORABLE SCOTT BRISTER: In TRAP 20 on indigence, if it's filed when the case is on appeal, the appellate court can conduct the hearing or refer the matter to the trial court with instructions, so if you had any question you could just use the same language. You can abate and refer to the trial court, refer it to the trial court. It seems to me "refer" carries no implication of rendition, that rendition might have set aside the judgment.

MR. JACKSON: Well, if we're going to talk about Rule 20...

CHAIRMAN BABCOCK: Okay. Any other comments to this rule? Are we ready to vote on this?

MR. GILSTRAP: Can we read it?

CHAIRMAN BABCOCK: Yeah. Which part of it do you want read?

MR. GILSTRAP: All of it.

CHAIRMAN BABCOCK: The whole thing?

MR. GILSTRAP: Please.

CHAIRMAN BABCOCK: The changes we have made have been to subparagraph (b).

MR. GILSTRAP: I'm sorry. That paragraph. Forgive me.

CHAIRMAN BABCOCK: Subparagraph (b), "Settled cases. If" -- and we've inserted the words, comma, "at any time," comma, "a case is settled by agreement of the parties and all parties to the appeal move the appellate court to effectuate the agreement of the parties," colon, striking the remaining language in that sentence.

And then under subpart (1) we've added -- after the word "appeal" on the second line we've added the word "or," and then we've rewritten subpart (c) to say, "abate the appeal until the lower court's proceedings to effectuate the agreement are complete," period.

And that's every change we've made in the rule. So with that --

MR. GILSTRAP: Did we agree to take "effectuate" out and put "effect"?

MS. BARON: No.

MR. GILSTRAP: Okay.

MS. BARON: So moved.

CHAIRMAN BABCOCK: Okay. So that's been moved, and --

HONORABLE SARAH DUNCAN: Second.

CHAIRMAN BABCOCK: And that's seconded. Everybody in favor of the rule as amended raise your hand.

Everybody opposed? 26 to 1, with our

immediate past chair dissenting.

PROFESSOR DORSANEO: Does that include the comment?

CHAIRMAN BABCOCK: Huh?

PROFESSOR DORSANEO: The comment is included, too?

MS. BARON: Yeah.

CHAIRMAN BABCOCK: That includes the whole thing.

Okay. Now, Pam, how quickly can we get through Rule 3a(5), which was the subject of the comments from Mr. Steves yesterday.

MS. BARON: I hope very quickly.

CHAIRMAN BABCOCK: Okay.

MS. BARON: May we proceed?

CHAIRMAN BABCOCK: I'd like you to proceed with that expectation in mind so Sarah can talk about final judgments.

MS. BARON: Okay. You do have a packet of materials on this. It's a memo on my letterhead dated January 11th. It has a copy of a letter from Mr. Steves, who did make the presentation to us yesterday, explaining his difficulties in obtaining copies of local rules from the clerks' offices around the state.

Our committee did a couple of things. One,

we did look to see what legislation governs actions by the clerks in providing information. There is a statute which is attached to your materials that places copying charge limits on materials provided by the clerk.

Second, I had asked Bonnie to do an informal polling among clerks to see how the rules are provided, and what she found from -- I think she had 15 clerks respond. All of them made copies of the local rules available in the clerk's office or the library or the administrative judge's office, and you can come in and usually get a copy for free in most of these. If you are asking that a copy be mailed to you, in some jurisdictions where the rules are very long and very heavy -- for example, in Bonnie's county I know they include lots of family law forms and the postage charges can be up to $3 just to get that material to the requesting attorney, but that by and large the clerks are trying very hard to be responsive.

What we wanted to do is not necessarily legislate how clerks should deal with such requests because of concerns with conflict with the Government Code and just problems of enforcement, what do you do if the clerk doesn't provide the information within ten days as Mr. Steves requests, and also a concern because we have changed the rule at our last hearing, and a copy of the

rule as we past amended should be in the materials.

We've expanded it beyond requests just of attorneys to requests of the public in general, and it's not clear in the future how much of a burden this will place on the clerks, but what we wanted to do was through a more informal process try to see if we can make these rules more generally available, particularly as new rules are filed, perhaps as they come to the Supreme Court, having them provided on diskette so that they could be posted on the clerks' website or in some way on the internet where they are much easier to find and to keep current.

And that was the proposal our committee came up with, but we did not embrace a rules change that would legislate how clerks would respond to requests for copies of local rules.

Bonnie, do you want to add anything to that?

MS. WOLBRUECK: The only issue is that clerks have been, much more over the last couple of years, inundated by what we call information miners that continue to want more and more documents, including local rules and information about local officials or directory information; and these are for production of a publication for their own profit; and because of that, I'm sure that maybe that's some of Mr. Steves' concern; but I do believe

in talking with clerks that, you know, local rules are readily available to almost anyone that requests them.

CHAIRMAN BABCOCK: Okay. And what did Mr. Steves -- did he have any particular county he was having a problem with?

MS. BARON: I think the letter was more general.

CHAIRMAN BABCOCK: He just says West Texas.

MS. BARON: Right.

MR. GILSTRAP: He said he had a difficult time in gathering all of the rules.

CHAIRMAN BABCOCK: Okay. All right. Now, the recommendation, Pam, that you-all have made, how are we going to communicate that recommendation? Are we just going to tell the Court that's what we think they ought to do or should there be a --

MS. BARON: I don't want to put anything in a rule that would require this to happen. I think it needs to be a project, and maybe it's something that this committee in a letter to Justice Hecht and to our rules staff attorney could suggest could be a procedure that the Court could adopt when passing on local rules and maybe even -- you know, I'd be happy to work with them. I know Bonnie would, too, in maybe commencing a project to try and gather copies of the local rules in postable form.

CHAIRMAN BABCOCK: Gotcha. Okay. Bill.

MR. EDWARDS: Again, I have been on the receiving end of some of this kind of business. We have a Rule 246 that deals with settings where you're out of town, you send a letter to the clerk, a return-addressed, stamped envelope, and they have got to give you notice of a setting; and if they don't, anything bad that happens to you when you don't get that notice doesn't count; and there are counties where it's difficult to get things unless you -- you know, they push you to hire local counsel or they have all kinds of things that you don't know about, and bad things can happen to you.

You get behind a mesquite curtain, there's no telling what might happen, and the -- it seems to me there ought to be some way that one can protect himself or herself by asking the clerk, "How do you get the rules?" and they have to tell you how you go about getting the rules so that you can get them. Something simple and inexpensive and where you have to be a party in the case and not just somebody that's mining for information.

MS. EADS: You can't do that.

CHAIRMAN BABCOCK: Linda.

MS. EADS: They have to make it available under Open Records whether you're a party or not, but I can -- just for the committee's sake, if we have some kind

of group that works on this, I can tell you that in testifying before the Legislature, they are very -- generally very hostile to saying "We'll provide it on the internet or on our website" without also saying "We will be equivalently providing it on hard copy."

There's a feeling in the Legislature that there's a lot of people without resources that are getting cut out of the information loop by those of us who have computers. So we have to be, I think, somewhat sensitive to how they will react to that, and not that we shouldn't make it available on websites, but we have to always be cognizant of their reaction and not also making hard copies available.

MR. LATTING: I guess I'm just almost astonished that the local rules aren't required to be on the internet. I mean, isn't this 2001, and how many people wanting to find local Rules of Civil Procedure don't have access to the internet? I mean --

MS. SWEENEY: Individual litigants in family law cases.

MR. LATTING: Okay. Well, how big a deal is this? I mean, why don't we just say to the clerks to put this on the net, on the web. What's the problem?

MS. BARON: Well, I will say that, you know, even if I didn't have the internet I can walk to my local

library now and get on the internet.

MR. LATTING: Yeah. I mean --

MS. BARON: It's not that hard.

MS. EADS: That takes -- and the Legislature would say to you that takes an ability to understand that you can do it and how you access it, and those of us who are so familiar with it can't imagine somebody isn't, but the Legislature is very sensitive to a whole group of the population that doesn't even know how to boot up a computer, and they don't want us to make a differentiation between information availability, which is a big issue for them on the Open Records issue, on the basis of computer.

I'm not saying it shouldn't be posted. It should be posted. We just cannot say that's the only way people get that information. The Legislature will not like that.

MS. BARON: Well, in the rule right now it says that anybody can request a copy, and it's not limited to attorneys, and obviously that still has to happen. Hopefully the request for copies would be reduced if the information is otherwise available in an easy way for most people who really need the rules to access them.

MS. EADS: Such as having them available in the office, would be fine.

MR. GILSTRAP: Chip, I'm not sure that it's

really our role to get in and deal with these larger policy issues, I mean, who has access to the internet, that type of thing. I think our role is to protect -- is to deal with what litigants do, and if litigants are having a problem getting these rules then what something like Bill says, let's just say that if you send them a stamped, self-addressed envelope and any fee requested, they have got to send it to you.

CHAIRMAN BABCOCK: Well, our job is always to do whatever the Court asks us to do, and the Court asked us to look at this, and I think it is dangerous to start trying to get behind why somebody wants the rules. In fact, as Linda correctly said, the Open Records Act specifically prohibits you from asking somebody why they want the information, so that can't be a consideration. So whether or not Mr. Steves is making money off of this or whether he just is a rule freak like all of us and wants to have a complete set doesn't much matter.

So the issue is whether or not we recommend a change to the rule, as Mr. Steves requests in the language he requests, or whether we say, "No change is needed, but you ought to do something else," or whether we have some third option. It's the recommendation of the committee that we not amend the rule in the way that Mr. Steves suggests but rather recommend to the Court that

the rules be placed on the internet as a supplement and not a replacement to the fact that all the clerks are supposed to make the rules available to anybody who wants them.

MR. LATTING: So moved.

MR. EDWARDS: Who is going to place them on the internet?

CHAIRMAN BABCOCK: Their suggestion is that the Court is at the time of approval.

MR. EDWARDS: The Supreme Court?

CHAIRMAN BABCOCK: The Supreme Court. Pam, is that correct? Is that the suggestion?

MR. YELENOSKY: But are we also suggesting -- I was on that subcommittee, too, and we were suggesting -- and, Pam, I don't know if you found out or whether or not the Supreme Court could do this, that the Supreme Court require that the local rules now in existence be transferred to it in a form that could be posted so that we don't just get future local rules but we get current.

MS. BARON: What I said is that Bonnie and I would be willing to work to try and help archive existing rules that are not currently being filed and approved, because that's probably, you know, the largest part of the iceberg.

CHAIRMAN BABCOCK: Yeah. And that's going to cure Mr. Steves' problem. Linda is absolutely right. For example, I could go in the library and spend several hours and not be able to access the Supreme Court's website.

MR. SOULES: I have a file that has all the local rules that were current, but if somebody wants to put them -- this is kind of deja´ vu for Elaine and me. We collected -- how many years ago? Ten years ago?

PROFESSOR CARLSON: That's why I have hair dye.

MR. SOULES: From all 254 counties their local rules or a written statement that they had none and put them together in a binder.

CHAIRMAN BABCOCK: You guys are easily amused.

MR. SOULES: And since then the only rules that should be effective are rules that came through the Supreme Court because it was at that time that 3a was adopted that no local rules were effective unless they came through the Supreme Court. Of course, the older rules were grandfathered.

MR. YELENOSKY: Would you be willing to turn that over to Pam and Bonnie?

MR. SOULES: Anybody who wants it can have

it because it's been sitting there. We were trying to --

CHAIRMAN BABCOCK: The proposal, as slightly modified, is this, that if Pam, and -- who else was your help on this?

MR. YELENOSKY: Bonnie.

MS. WOLBRUECK: I will.

MS. BARON: Bonnie.

CHAIRMAN BABCOCK: Would try to work with the Court to ensure that the existing local rules get onto the Supreme Court website as a supplement to what is already supposed to be happening at the district court clerks' office, which is they're supposed to be giving the rules to anybody who wants them.

HONORABLE SARAH DUNCAN: Under what provision? Under the Open Records Act?

CHAIRMAN BABCOCK: Well, it's under the current Rules of Procedure.

HONORABLE SARAH DUNCAN: No, it's not. Under subdivision (5) "All local rules or amendments adopted and approved in accordance herewith are made available upon request to members of the Bar." So it's limited, one, to requests by members of the Bar, and, two, to amendments and rules adopted pursuant to 3.

MS. BARON: Well, that's not true in our amended version which is on the last --

HONORABLE SARAH DUNCAN: Oh, I'm sorry. I'm sorry.

MS. BARON: On the last page of the packet that we circulated --

HONORABLE SARAH DUNCAN: I'm sorry.

MS. BARON: -- it says, "The local rules must be available upon request," period.

HONORABLE SARAH DUNCAN: Right. Sorry.

MS. BARON: We're not going -- we didn't want to legislate with how much clerks could charge in terms of copying and postage or how promptly they had to respond to this request, because, one, the Legislature has already put constraints on copying charges and, two, we couldn't view any kind of mechanism for sanctioning clerks if they didn't respond within ten days.

HONORABLE SARAH DUNCAN: I apologize.

CHAIRMAN BABCOCK: Okay. Apology accepted. Elaine.

PROFESSOR CARLSON: So is it your understanding, Pam, that the Supreme Court has approved all the local rules?

MS. BARON: No. They have only -- since 2a was adopted they have approved them going forward, and what we would try to do is archive those plus the ones that were in existence before that by asking the clerks

through the newsletter that Bonnie edits to provide that information on diskette, please.

PROFESSOR CARLSON: I guess the Court could do a disclaimer.

MS. BARON: Right.

PROFESSOR CARLSON: "We don't necessarily approve, but here are the rules," and put them on the web.

MS. BARON: Right.

PROFESSOR CARLSON: There's some doozies.

CHAIRMAN BABCOCK: It's an ongoing project, but what we need from this committee is an expression of approval or disapproval as to the approach that Pam's subcommittee is recommending, which is to amend the language along the lines that --

MS. BARON: Not to amend the current version of the rule as we approved it last time.

CHAIRMAN BABCOCK: Right.

MS. BARON: That is our proposal, and I so move.

CHAIRMAN BABCOCK: Okay. Thank you.

HONORABLE JAN PATTERSON: Second.

CHAIRMAN BABCOCK: Second. All right. Everybody in favor raise your hand.

All opposed?

MR. LATTING: Well, do we have an expression

or how does the committee feel about an expression from this committee that -- and I think this is what you had to say, Frank, about litigants, that it seems to me that we ought to say that local rules, all court rules, ought to be available on the internet. There ought not to be any big hassle to get a set of local rules. You ought to be able to hit the net and get it.

CHAIRMAN BABCOCK: Let me announce the vote. The vote was 26 to 1 in favor of the proposal, and now there's a further comment that there ought to be a rule that requires --

MR. LATTING: No, I am not proposing a rule. I'm proposing some expression from this committee to the Supreme Court that it make some policy statement to that effect.

CHAIRMAN BABCOCK: Okay. Get with Pam and Bonnie to include language in the transmission to the Court that you think would do that.

MR. LATTING: Okay. Well, is that the sense of the committee or not?

MR. ORSINGER: Oh, I agree totally. Absolutely.

MR. YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Yeah. I don't think there is anybody in disagreement with that.

MR. LATTING: Okay. All right.

MR. WATSON: In counties that have electricity.

CHAIRMAN BABCOCK: Skip would be in a county --

HONORABLE GENE TERRY: Being from one of those counties that doesn't have electricity.

MR. LATTING: And I'd like to comment that finding something on the internet is much easier than finding something using the index to the Rules of Procedure.

CHAIRMAN BABCOCK: We have that big fat blue book. That was Judge Terry that made that comment.

MR. TIPPS: Just to clarify, is it our sense that the local rules should be available on the internet through the Supreme Court's website?

MR. YELENOSKY: Yes.

MR. SOULES: Yes.

MR. LATTING: Yes.

MR. TIPPS: We're not talking about having to have a Duval County website.

CHAIRMAN BABCOCK: I know this is an exciting topic, but Bobby. It woke Orsinger up.

MR. MEADOWS: There may be problems here that I don't appreciate, but if we have, as I know we do,

litigants who are being harmed by the unavailability of rules that are in effect in counties where you don't normally practice and we've got a rule that says that local rules are not effective unless they are approved by the Supreme Court, why wouldn't we also say that they are not effective unless they are published on the internet?

I mean, that's not the only way they can be made available. It doesn't change the rule, but you can request them, and they have to be provided, but at least then we have got some assurance that litigants who are traveling to West Texas or wherever have access to the local rules.

MS. BARON: Well, they have access to them in the courthouse. There is no question about that, and then they should be able to obtain copies mailed to them if they are willing to pay the $3 or whatever the clerk wants to pay the postage.

MR. LATTING: But Bobby's point is you ought not to have to mail something and send postage and money. You ought to be able to get on the internet and see that.

MS. BARON: I think it's fine to say that they should be on there, but to say that if they're not on there they don't work is a different issue.

HONORABLE SCOTT BRISTER: Reversible error.

MR. YELENOSKY: Can we give Pam and Bonnie

an opportunity to make that happen by working with the Supreme Court without first putting it in a rule, because my notion was that the Supreme Court essentially would require all of the local courts to give them existing rules and then for future rules it's just a matter of the Court itself putting them on, right, Chris? Chris is grimacing, though. You don't think you can get them?

MR. GRIESEL: There's a file cabinet in the basement of the clerk's office which contains five drawers of local rules of 254 counties plus courts that have multi-county functions, plus counties where there's a uniform measure, plus presiding regions, plus courts of appeals. So it's an -- I'm not sure a litigant looking to find all of the rules for Dallas County would necessarily be able to find all of the rules affecting a case in Dallas County, but that aside, most of those rules also are in paper form from any time beginning in 1939 forward, and I agree that it's probably easier to capture information going forward than it is going backward.

It is an impressive job. Even to scan those documents and make them available and try and tell the litigant which of the rules have or haven't been superseded, that's a pretty interesting task.

MR. YELENOSKY: But the alternative is not to even have them.

MS. EADS: Right.

MR. YELENOSKY: So can't the Court --

MR. GRIESEL: They're also available -- and I spend a good portion of my day sending out copies of what we have as the local rules for the counties to litigants and lawyers.

MR. YELENOSKY: But couldn't you have the counties do some of the work by saying --

MR. GRIESEL: Sure.

MR. YELENOSKY: Bonnie and Pam saying, "You have to give it to us in a form that can be" --

MR. GRIESEL: Sure.

MR. YELENOSKY: -- launched on the web," and if they have to scan it, fine, each of the 254?

MR. GRIESEL: I look forward to working with Bonnie and Pam on the issues of what we ought to ask going forward and coming backwards.

CHAIRMAN BABCOCK: Okay. Richard, Joe, and then Luke, and then we're going to shut this down.

MR. ORSINGER: I agree that the best solution is for the Supreme Court to post the rules and to issue an order to the courts or the clerks of the courts directing that they now in the year 2001 send the current version of their local rules in digital form to the Supreme Court.

MR. LATTING: Here, here.

MR. ORSINGER: So that you don't have to go into anybody's basement and look since 1939 forward, and it doesn't have to be in a rule. The Supreme Court can issue an order on its miscellaneous docket, and then if you have a noncompliant court, you just get on the telephone and talk to them, and they will get the problem solved.

CHAIRMAN BABCOCK: And Joe would second that.

MR. LATTING: I second every syllable, comma, and --

CHAIRMAN BABCOCK: Okay. And Luke would say --

MR. SOULES: Well, I'm just trying to find out why section (6) of Rule 3a is not in the rewrite. It says, "No local rule, order, or practice of any court other than a local rule or amendment must fully comply with the requirements."

MR. YELENOSKY: It's the first -- we moved that to the top --

MR. SOULES: Okay. I'm sorry.

PROFESSOR CARLSON: I think, having read all the local rules, that there are so many probably unconstitutional provisions, improper provisions, I would

be surprised if the Court were willing to put those with their infer mater on their website.

CHAIRMAN BABCOCK: Okay. Well, that said, those are details. We'll work those out. Okay. Now, we have got half an hour left, and we have got two choices about how to productively use our time. We've got Joan Jenkins' revision as to 194.2, but we also have a request from our immediate past chair to get into something that is the whole reason for why he's here, which is the final judgment rule, so -- I'm being facetious, let the record reflect. He's here for many reasons, but what do you want to do? Luke, do you think we should get started on final judgment?

MR. SOULES: Well, this is going to take more than one session.

CHAIRMAN BABCOCK: That's for sure.

MR. SOULES: And we're going to have to start it sometime, and then we're going to have more sessions after that, so if we're going to advance the ball or start advancing the ball, we probably need to get to it, but I don't know whether a half hour is even enough to --

CHAIRMAN BABCOCK: Well, we have started it. We have had a discussion about it.

MR. SOULES: Well, several times.

MR. ORSINGER: We can probably get these discovery rules out of the way real quickly. We just made some fairly noncontroversial changes last time.

CHAIRMAN BABCOCK: Sarah, how are you about that? What's your preference?

HONORABLE SARAH DUNCAN: My preference would be to discuss to the extent necessary and take a vote on doing nothing, doing a magic language rule, or doing some type of death certificate, although -- because what we ended up with last time was that we were supposed to draft magic language rule and death certificate without the committee having decided whether to adopt either or anything.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. YELENOSKY: Can we take just two minutes on something that would apply to future meetings which is really just housekeeping, the notifications we get, because I know due to budgeting not everything is available, and I had suggested to Carrie just before we left something we might do. Can we take that up or --

CHAIRMAN BABCOCK: Let's see. Let's see what substantively we are going to do first and then, yeah, we can take that up. So, Sarah, in terms of spending a half hour on that, you want to do that?

HONORABLE SARAH DUNCAN: I do.

CHAIRMAN BABCOCK: Okay. Well, then Sarah wants to go forward with the final judgment, so let's do that. If we can sneak in revisions to 194.2 in the next half hour, we'll do it.

So, Sarah, go ahead. Tell us where you are and tell us what you want us to do for you.

HONORABLE SARAH DUNCAN: As I said at the end of the last meeting, we spent an enormous amount of time debating whether to have a rule that had a requirement that certain language be included for the judgment to be final and appealable. We worked our way through a complete circle on that discussion and decided that we would have such a rule.

Close to the end of that discussion Justice Hecht raised the possibility of an alternative to a magic language rule, that alternative being something that called -- that we working in our discussions called a death certificate that was like an order of closure that made the judgments and orders in that case appealable, and we ended that discussion with the direction to my subcommittee to draft both the magic language rule and a death certificate and then the committee could decide which, if either, it wanted to do.

So what we've done is draft these alternative provisions, both of which copies were on the

table. The document entitled "Judgments, Orders, and Decrees, Appealability" incorporates the votes from the last meeting, both on what the magic language should be, that the title be "Final Judgment or Decree," and that be just a "should," that it not be mandatory. It says that.

The other one I have just unilaterally called "Order of Appealability" -- this is the death certificate -- and tried to incorporate the comments that were made at the meeting about what this death certificate should contain.

MR. WATSON: So the two-page one is the death certificate?

HONORABLE SARAH DUNCAN: Right. The one that has in the middle of the page "Order of Appealability."

I guess the only advice I have at this point is that working on these made me ill. I mean, thinking about all of the ramifications of either one is mind-boggling; and as Mike Hatchell said at the last meeting, if we adopt something akin to a death certificate, we will have to go through and pick out all the rules and all of the statutes that will need to be amended to reflect what is a radical change in Texas procedure.

That said, that both of them made me ill, I

have come to firmly believe that the way we should proceed is something akin to the death certificate. My committee can't even decide. We can't agree on whether substantial compliance with magic language rule should be enough or not, and certainly the members of the full committee didn't agree on that.

The advantage to the order of appealability -- and I don't care what you call it, death certificate -- is that it would be a form promulgated by the Supreme Court. It could only ever be this one form. Everything would be keyed from the order of appealability. It's -- as we discussed at the last meeting and decided, it's adjudicative in the sense that it resolves any claims that are outstanding but perhaps not known to the trial court or the parties, and it's incorporating in the sense that all subsisting prior orders and judgments are incorporated into this order.

Now, the details of how it would work, for instance, the pre- and post-judgment interest issue, is something that I think we would need to work on and help on, but -- and my subcommittee has not voted on which of these we prefer because we were directed just to come back with both. So the preference expressed is my preference and not that of the subcommittee.

CHAIRMAN BABCOCK: In shorthand, we have the

"Order of Appealability," also known as the death order --

HONORABLE SARAH DUNCAN: Death certificate.

CHAIRMAN BABCOCK: Then we have "Judgments, Orders, and Decrees, Appealability," which contains the magic language. So we have the magic language order versus the death order.

HONORABLE SARAH DUNCAN: Death certificate.

CHAIRMAN BABCOCK: Death certificate. Sorry.

MR. LATTING: How do they differ from a policy point of view?

CHAIRMAN BABCOCK: How do they differ from a policy point of view?

HONORABLE SARAH DUNCAN: They differ quite a bit. What the magic language rule says is that -- they track each other to the extent that they recognize that interlocutory orders are made appealable by statute, and if you've got one of those, it's appealable. They are the same to the extent that they codify the rules of appealability for probate and receivership cases.

Where they differ is in the magic language rule, that last subsection (d). "If it's a judgment or order rendered in a civil case, the first paragraph of the judgment or order must contain this statement: 'This is a final appealable judgment or order. All relief requested

in this case that is not expressly granted in this judgment or by a subsisting prior written order is denied.'" If that language isn't in the last order disposing of a party or claim in a case, if it's in there, that order or judgment as well as all the previous subsisting orders and judgments are appealable at that point forward.

I, at least, find that a little confusing because it doesn't directly tell me that all prior subsisting orders and judgments are now appealable, too, but that's just the jurisprudence.

MR. LATTING: That's the magic language part of it. How about the death certificate?

HONORABLE SARAH DUNCAN: The death certificate, it doesn't matter what language is in any judgment, order, or decree that's been entered in the case. Until the court signs an order of appealability in this form no judgment, order, or decree in the case is appealable.

MR. LATTING: And what's the policy underlying those two different approaches?

HONORABLE SARAH DUNCAN: Well, the magic language rule was the less radical, in retrospect, suggestion of my subcommittee as an attempt to try to solve the problems associated with finality that you can

have several orders in a case, and it's the last order that disposes of the last party or claim that renders all previous ones appealable, and that would include the Mother Hubbard problem. So the magic language rule was the subcommittee's, viewed retrospectively, less radical approach to the problem.

MR. YELENOSKY: Well, isn't it just you have a separate piece of paper?

HONORABLE SARAH DUNCAN: I'm sorry?

MR. YELENOSKY: The death certificate is a separate piece of paper.

HONORABLE SARAH DUNCAN: It is a separate piece of paper that is, one, the trigger, and, two, the Mother Hubbard clause for the whole case.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Let me see if I understand here. (2)(a) in the "Judgments, Orders, and Decrees, Appealability," may be -- it's the same problem in the other one, but -- the same issue in the other one. I'm not certain at this point. A number of statutes say that -- in the Government Code and the Civil Practice and Remedies Code that a final judgment is appealable. Now, when you go down to (d) here, "It is a judgment or order rendered in a civil case and the first paragraph contains the following statement."

All right. Now, with the way I'm reading this to see if I understand it is that if it's a final judgment made appealable by statute, it's appealable, but (d) would cover it even if it's not a final order or judgment but it says so.

HONORABLE SARAH DUNCAN: I understand. But "It is made appealable by statute" is meant to incorporate only appealable interlocutory orders.

PROFESSOR DORSANEO: Well --

HONORABLE SARAH DUNCAN: Because it is the concept of finality that gives us so many problems, and you would have to amend the Civil Practice and Remedies Code, rules, statutes, wherever they may be, that make a final judgment appealable.

PROFESSOR DORSANEO: See, I'm against that approach generally because I think it's one that's not only a complete change in our jurisprudence on this subject, but because it's doomed to failure.

CHAIRMAN BABCOCK: You're talking about magic language now?

PROFESSOR DORSANEO: You can't make magic language do the job that is a difficult job. There really aren't magicians around who can fix things or make problems go away by the use of magic.

CHAIRMAN BABCOCK: How about Mother Hubbard?

HONORABLE SARAH DUNCAN: You raised that last time, so that's not a change in position on your part.

MR. GILSTRAP: Bill may be right, but we've crossed that bridge last time.

HONORABLE SARAH DUNCAN: Yeah.

MR. GILSTRAP: I mean, I think. If you really want to go back and revisit, let's understand if we're doing it. Last time I think we voted -- we looked at it and we said, "We understand there may be a problem with open judgments," you know, when they don't have the magic language everybody thinks that they do have the magic -- that it's a final judgment nevertheless, but at that point we decided that we were going to have something that had to be in a judgment that would be an unmistakable sign to the world that it was a final judgment and without which the judgment cannot be final.

PROFESSOR DORSANEO: That's a different question. All I'm saying here is that you can't put in (2)(a) -- or it would be a better idea just to leave that out of (2)(a) and to say that it's not a final judgment unless it has the magic language in it.

MR. LATTING: Uh-huh. That's different from saying it is if it does.

MR. GILSTRAP: Well, but, no, if it's

appealable by statute, for example, interlocutory appeal. That's appealable by statute. It doesn't have the magic language because it doesn't dispose of all claims.

PROFESSOR DORSANEO: Well, listen to me. If you don't -- if you want to say that, "interlocutory order," that's fine, but to say "No judgment or order is appealable unless it's made appealable by statute" is something entirely different from what you're saying that's meant to mean. That's not acceptable to me to use words to mean something other than what they say. And it's also not acceptable to say to me, "Well, we will change everything else to make it mean what this is meant to mean by cross-reference."

MR. GILSTRAP: And you're talking about the statutes which say it's made final by law or something? Other statutes that --

PROFESSOR DORSANEO: That a final judgment is appealable. There's two of them, 51.012 and the Civil Practice and Remedies Code companion provision.

HONORABLE SARAH DUNCAN: Can we get away from the terms of either provision and just look at whether the committee wants to go forward with a death certificate or magic language?

PROFESSOR DORSANEO: Okay. Now, let me talk about the magic -- I think that the final judgment concept

is not incompatible with an idea that before it's a final judgment it has to have magic language. All right.

MR. GILSTRAP: Okay.

PROFESSOR DORSANEO: Right?

MR. GILSTRAP: Oh, I understand.

PROFESSOR DORSANEO: But going to this magic language here, if you will bear with me for a second, this magic language says, "This is a final appealable judgment or order." Again, not wanting to decide whether it's a final judgment or an order that's otherwise appealable. It's unsatisfactory magic language. Right?

"All relief requested in this case that is not expressly granted in this judgment or by a subsisting prior written order is denied" is unsatisfactory if it's only an interlocutory order that's appealable, because there are lots of things that that case will still be about, not expressly granted in any order that are not, you know, up for consideration yet.

HONORABLE SARAH DUNCAN: This is the magic language that was voted on at the last meeting.

PROFESSOR DORSANEO: Well, notwithstanding that --

HONORABLE SARAH DUNCAN: Except for the word "subsisting," which was added according to Bill Edwards' suggestion.

MR. GILSTRAP: Bill, I hear what you're saying, and it may be that I'm just not as familiar with the statutes that would cause problems here. If you could maybe tell us what they are or at a later time tell us what they are, it would be helpful. I understand your concern, but I just don't know exactly what you mean.

PROFESSOR DORSANEO: But my point is I like the magic language approach. I don't necessarily think a separate order would be a bad idea either. I don't think it's necessary. I like the magic language approach, but I don't like the magic language that you have here.

HONORABLE SARAH DUNCAN: This is the magic language that was voted on at the last meeting.

PROFESSOR DORSANEO: But I thought it was magic language to be included in final orders, final judgments, and not magic language to be included all the time.

HONORABLE SARAH DUNCAN: See, this is why I have come firmly to believe that the death certificate is the way to go, is because any time we try to talk about this issue in terms of finality and interlocutory -- final and interlocutory we are starting in on the circle that the whole problem is that a lot of people don't know when something is final or interlocutory.

PROFESSOR DORSANEO: To me the problem is

not with these interlocutory orders that are misidentified as orders that are appealable or not. That's kind of a separate problem. The problem is when we have an order that's the last order and people don't recognize it as the order that finalizes the case as a whole.

Now, there's a separate problem of how do you harmonize a series of separate orders that are part of the so-called one final judgment. Huh? I like magic language in the last order because it says, "Okay, this is the last order in this case." I don't think it's necessary to have that magic language in every -- you know, in a temporary injunction. Okay? Because if it's a temporary injunction I know it's appealable. I don't think it's necessary to have it in a --

MR. GILSTRAP: But that's appealable by statute, so it's not necessary to have it in there to make it appealable.

HONORABLE SARAH DUNCAN: Right.

HONORABLE JAN PATTERSON: But one of the goals, remember, that's consistent with what Bill is saying is that I think one of our desires is to replace Mother Hubbard language so that it's intelligible.

PROFESSOR DORSANEO: The problem with Mother Hubbard language is not that it was a bad idea, but that the language, at least the last couple of meanings, is

ambiguous. It's not clear enough language.

MR. GILSTRAP: And certainly the language that's in this magic language order is clear.

CHAIRMAN BABCOCK: Let's -- Steve, just for a second. Let's try to answer the question that Sarah posed, which is what is the committee's view on magic language versus death certificate; and remember that Justice Hecht, not to speak for him, but I think his initial concern was that the Federal rule, which has a single piece of paper kind of concept which may be more akin to the death certificate, has caused problems in that there are many cases that don't have the magic piece of paper.

HONORABLE SARAH DUNCAN: Well, but the problem -- I believe Justice Hecht made clear at the last meeting the problem in the Federal -- with the application of the Federal rule is that the Federal rule requires that the entry of judgment be in a separate document.

MS. EADS: Right.

PROFESSOR DORSANEO: Prepared by the clerk.

HONORABLE SARAH DUNCAN: And Justice Hecht was fine with the concept of a death certificate because that's not requiring that the judgment itself be in a separate document.

CHAIRMAN BABCOCK: Okay. That being the

case, Luke, what do you think about death certificate versus magic language?

MR. SOULES: I think if we use the death certificate we're going to run into the same problems that the Federal courts have had that they don't get used and ' then now what? And they have got a whole array of --

HONORABLE SARAH DUNCAN: But it's a different -- it's a whole different thing than under the Federal rule.

CHAIRMAN BABCOCK: Okay. Let's not argue it. Let's just see what everybody thinks about it.

MR. SOULES: Also, and this may be more of a language problem, but it says that "No judgment or order is appealable unless." Does that mean that a judgment or order of this nature is appealable?

HONORABLE JAN PATTERSON: We're going to vote on magic versus death.

CHAIRMAN BABCOCK: Yeah, you're getting into the details of what the magic language is. Let's just see what your preference is, death certificate versus magic language, and do I hear you saying that you're more a magic language kind of guy?

MR. SOULES: Yeah, I think so. I just think it would be easier to train the trial counsel to use different language. I mean, we haven't got them all

trained yet to use Mother Hubbard.

CHAIRMAN BABCOCK: Yeah, this is not a binding vote. Wallace, what do you think?

MR. JEFFERSON: I think death certificate is preferable.

CHAIRMAN BABCOCK: And because?

MR. JEFFERSON: Because people don't -- they don't realize when a case becomes final today; and they put magic language in cases that shouldn't have it; and if they got this order of appealability that is mailed to all parties upon final resolution of the case, I think they would then finally have the understanding.

CHAIRMAN BABCOCK: Skip, what do you think?

MR. WATSON: Well, as the person who coined the phrase "death certificate," I have a certain proprietary interest in its continued use. I like the idea of separating the concept of a final, enforceable judgment from the concept of appeals, and I think that's what the death certificate does. It says that regardless of whether you want to fight over anything else, the appeal starts when there's an order of appealability.

To me that's clean. Nobody can screw it up, and even if we go through a small period of time of courts of appeals having to write letters saying, "We're ready to file this as soon as you get an order of appealability up

here," that will be fine. We'll get through that, and it will be done.

CHAIRMAN BABCOCK: Judge Medina, do you have any thoughts -- any preference between magic language.

HONORABLE SAMUEL MEDINA: I think death certificate. I think it makes -- it makes someone say, "Okay, this is it," instead of just throwing language into some document. I think death certificate.

CHAIRMAN BABCOCK: Okay. Bobby?

MR. MEADOWS: Same.

CHAIRMAN BABCOCK: Bill?

MR. EDWARDS: Same.

CHAIRMAN BABCOCK: Linda?

MS. EADS: Same.

CHAIRMAN BABCOCK: Judge Patterson?

HONORABLE JAN PATTERSON: I prefer the magic language as a transitional form for -- I don't think that the death certificate is going to solve litigation in this area. I think it's going to create a whole new body of law; whereas, I think with the magic language we can just ease into a different system, and so I prefer magic language.

CHAIRMAN BABCOCK: Andy, do you have any thoughts about this?

MR. HARWELL: Well, just recalling from the

last meeting, if there is a so-called death certificate versus magic language, there was the point made about the clerk deciding when that might happen and then issuing the paperwork, in effect, to all the parties; and I'd like for the burden not to be on the clerk to decide when that is, but that the order comes from the judge to -- in that case.

HONORABLE SARAH DUNCAN: That is one of the great advantages of the order.

MS. SWEENEY: What?

CHAIRMAN BABCOCK: So you're a death certificate kind of guy?

MR. HARWELL: I have no -- I will leave it to you folks whether it's death certificate or magic language. I'm just speaking for the clerks that the onus of deciding that it's a death certificate, that it is not up to the clerk but it's up to the judge.

CHAIRMAN BABCOCK: The clearer it is, the better you like it?

MR. HARWELL: Right.

CHAIRMAN BABCOCK: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: Before I say which one I prefer I want to be sure I understand the differences. The death certificate not only is a separate piece of paper from judgment, it just is a lot more

explicit and explanatory? It does the same thing. It just flags a separate instrument and it lays it out for those who might read over this magic language and not understand it? Am I correct in thinking that?

HONORABLE JAN PATTERSON: No.

HONORABLE SARAH DUNCAN: I think you are correct in thinking that, and part of the impetus, I assume, for Justice Hecht's suggestion is that it's very easy to shove a piece of paper in front of a trial judge and get the trial judge to sign it, and the trial judge perhaps doesn't intend that the order render everything appealable, but it would, in fact, have that effect. And it's harder to mistake signing an order of appealability than it is an order with magic language that may be misplaced.

HONORABLE DAVID PEEPLES: Okay. I'm just thinking about how this is going to play out in the trial courts. I've seen places where -- you know, criminal courts, they have got a big stamp that has about 200 words on it, "defendant admonished," and just the whole works, and they stamp that and sign it. Okay. And I can see how we'll have our magic language stamps or we'll have an order of appealability, there will be a stack of them right there, and, I mean, if we want to make something final and, as everybody says, "This is supposed to be

final, but I forgot" or "I didn't know about the new rule change" and so forth, we will take care of it. But I have some concerns about, you know, if an order of appealability is a separate instrument then that means that you can't tell by looking at a judgment itself whether it's final because you've got to have this.

MR. SOULES: It won't be final.

HONORABLE DAVID PEEPLES: Huh?

MR. SOULES: I guess it won't be final.

HONORABLE SARAH DUNCAN: It may or may not be final, but it won't be appealable.

MR. SOULES: Okay.

HONORABLE DAVID PEEPLES: Well, and then there's another question about does "appealable" mean everything is finished in the trial court, too?

MR. GILSTRAP: If it's not appealable, it can be reopened. If it's not appealable, the case can be reopened. The trial court has got to continue to have jurisdiction over the case.

HONORABLE DAVID PEEPLES: Yeah. And the language in the death certificate does talk about, you know, interest and enforcement and post-judgment motions and appealability, which I think we would be making a bad mistake to uncouple those.

HONORABLE SARAH DUNCAN: Right. And that's

why Frank at one point asked why did I put the sentence in, "It appears to the court that all claims by all parties have been disposed of by prior written order or judgment." That is the factual conceptual underpInning to the order of appealability.

CHAIRMAN BABCOCK: David, you want us to come back to you?

HONORABLE DAVID PEEPLES: The last thing we haven't talked about is that it's one thing for the judge to sign these, but that doesn't talk about the question of do the litigants get notice of them; and if we're thinking that the order of appealability will be what gets sent out under Rule 306a, that's one thing.

HONORABLE SARAH DUNCAN: If you look at paragraph 3 --

CHAIRMAN BABCOCK: Let's not get into the details. We want to know which approach you like better.

HONORABLE DAVID PEEPLES: Well, the approach I like is to take the existing law and make some rifleshot changes that will correct the problems that we have been talking about -- and there are three of them -- instead of rewriting the whole thing.

The first one is inadvertent loss of rights when a Mother Hubbard gets slipped in, and the second is the series of orders and the last one makes it final and

nobody knew about it, and the third problem is judges and clerks have trouble figuring out finality.

CHAIRMAN BABCOCK: So which of these approaches do you think better solves those problems you've identified? And there are three categories, death certificate, magic language, or don't know/something else.

HONORABLE DAVID PEEPLES: Oh, I don't think the death certificate is the way we want to go.

CHAIRMAN BABCOCK: Okay. This is --

HONORABLE DAVID PEEPLES: I think that what we've got right now is almost the magic language except we don't require "final and appealable" to be in there.

MR. GILSTRAP: And we have ways in which judgments can become final without magic language, like Northeast Independent School District. Those will all go away now under either approach.

CHAIRMAN BABCOCK: So are you a one, two, or three?

HONORABLE DAVID PEEPLES: Well, I'm probably for magic language if my only choices are those.

CHAIRMAN BABCOCK: Well, you've got death certificate, magic language, or some other approach. This is nonbinding.

MR. TIPPS: Two-month recess.

MR. HARWELL: Vote a friend.

HONORABLE DAVID PEEPLES: It depends on what the third and other option was.

CHAIRMAN BABCOCK: Okay. Don't know. Carl.

HONORABLE DAVID PEEPLES: I'm not going to be stampeded into this.

MR. HAMILTON: I like the approach we were talking about last time with definitions, what is a final judgment, and then the magic language has to go in there.

CHAIRMAN BABCOCK: So you're a magic language guy. Dorsaneo, I know you are.

PROFESSOR DORSANEO: Well, let me say the order of appealability, or maybe death certificate -- and I don't think this is a detail -- I mean, it really does change the final judgment, or arguably does. It orders all relief not expressly granted is denied. It aptly -- it is a death certificate, so I'm getting all of these -- I'm a lawyer. I have this piece of paper, these pieces of paper that are orders in the case that may or may not amount to a final judgment and then I've got this, and I don't think that simplifies it.

CHAIRMAN BABCOCK: I just want to hear from everybody. Elaine.

PROFESSOR CARLSON: I share Sarah's concern, her ill feelings, when I think about the subject because it is so interwoven and complex that I fear that what

looks to be a simple fix will have lots of -- could have a lot of unintended consequences, and I tend to feel safe harbor in Judge Peeples' notion that we focus on at least two huge immediate problems that could be solved fairly simply. Well, I think they could.

HONORABLE SARAH DUNCAN: I'm just talking to myself.

PROFESSOR CARLSON: And I hear different interpretations. Skip is saying, "Yeah, let's uncouple finality from appealability," and then I hear someone say, "I like this rule because it couples and retains finality and appealability." So I guess my question for clarity purposes before I give an answer is is the scheme envisioned on this that notwithstanding whether a judgment or order is final or not, you need an order of appealability to go forward?

MS. SWEENEY: Yeah.

MS. EADS: Uh-huh.

CHAIRMAN BABCOCK: That's the death certificate concept.

PROFESSOR CARLSON: So we're not changing any of the --

MR. GILSTRAP: Or the magic language concept.

PROFESSOR CARLSON: -- finality concepts.

MR. GILSTRAP: They are both the same. It's without which not.

PROFESSOR DORSANEO: Except this order of appealability --

PROFESSOR CARLSON: Doesn't do it.

PROFESSOR DORSANEO: -- has an effect beyond saying it's time to appeal. It has an effect upon what happened so far.

PROFESSOR CARLSON: Because of paragraph (1).

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: It was decided in the last meeting that whatever this death certificate looked like it needed to be adjudicated to the extent that it cleaned up any outstanding phrases.

CHAIRMAN BABCOCK: Yeah. No, we're just going to go around.

PROFESSOR DORSANEO: That's just saying Mother Hubbard needs to be put in the order of appealability, whether that's a good idea or not. "Batoing."

CHAIRMAN BABCOCK: Okay, Elaine.

PROFESSOR CARLSON: I like the concept then of the order of appealability, but I don't like necessarily this one.

CHAIRMAN BABCOCK: You like death certificate as a concept. Okay, Pam.

MS. BARON: Well, short of issuing every judge in the state red sealing wax and a signet ring, I would go with the magic language.

CHAIRMAN BABCOCK: Magic language. Joe.

MR. LATTING: I don't know, and I want to say one thing about that. It seems to me before we change a rule that we ought to have two criteria. One is we ought to know why we're doing it and precisely what ills it is designed to cure, and we ought to have a good sense that our cure will do no harm or will do less harm than the harm that is currently being experienced; and, finally, to quote Buddy Lowe, there is so little I understand about this and so much that I don't that I just don't -- I don't know yet, but I'm not ready to say, well, I think we ought to do one or the other. It sounds to me like that that's just like saying, "Let's give the patient the blue medicine instead of the red mediciine and see what happens. Hell, he might get better."

CHAIRMAN BABCOCK: This is a nonbinding discussion. Frank.

MR. GILSTRAP: I have great reservations about the open judgments problem, and either one of these is going to create problems with open judgments. I would

prefer the magic language of the two.

CHAIRMAN BABCOCK: John.

MR. MARTIN: I have a slight preference for the death certificate with the caveat that you shouldn't have to get magic language or a death certificate or anything else if it's an interlocutory appeal by statute, so you don't run into a judge who signs an order and then won't sign --

HONORABLE SARAH DUNCAN: That's why it's in this --

CHAIRMAN BABCOCK: Paula Sweeney.

MS. SWEENEY: I agree with what Judge Peeples said very, very much, that we have some discreet problems, and we should be solving those. So as between the choices that you present I would pick C, other, which is let's solve the smaller problems or the specific problems; and the other thing that I would add is if we're going have a death certificate concept, is that going to be considered a ministerial act that can be mandamused, or is this another thing we may have to wait nine months to get from a court?

MR. LATTING: Yeah. Yeah.

MS. SWEENEY: You've already got everything done, and it is ready to be appealed, but you don't have your piece of paper, and are we just adding another delay

and another semi-pointless hurdle?

CHAIRMAN BABCOCK: Yeah. Joan. The issue on the table, since you stepped out for a second, is that we're saying in a few words or less whether we prefer the death certificate concept, the magic language concept, or a third category of, hey, we have got specific discreet problems, let's fix those and not have a grand scheme. So what's your preference.

MS. JENKINS: My preference?

CHAIRMAN BABCOCK: Yeah.

MS. JENKINS: I agree with what Paula just said. I am concerned about adding another layer.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: Probably just for the obvious issue of paper I would probably like the magic language, but the death certificate would be fine. I just have one question with the wording on the death certificate. Is there an execution issue here as far as if I don't receive the death certificate I cannot execute?

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Okay. David, you got a dog in this fight?

MR. JACKSON: I'll leave it to wiser minds.

CHAIRMAN BABCOCK: Tipps.

MR. TIPPS: Death certificate.

CHAIRMAN BABCOCK: And Stephen.

MR. YELENOSKY: Same thing. And I have to leave town. Can I get my housekeeping thing in before I leave?

CHAIRMAN BABCOCK: If you'll just let Richard vote and then I'll announce the results and then get the housekeeping thing.

MR. YELENOSKY: Thanks.

MR. ORSINGER: I feel like we have problems that are unique to multiparty lawsuits and summary judgments and that we're screwing up the vast number of cases to solve a small problem. So I go with the third category of specific problems need to be addressed and don't change the whole way we practice law.

MR. EDWARDS: And I have been convinced that the third way is right.

PROFESSOR CARLSON: I am, too. I'm changing to three.

CHAIRMAN BABCOCK: Let's see. Okay.

PROFESSOR DORSANEO: Just have people vote over again instead of going one by one.

MR. HAMILTON: Let's have a recount.

HONORABLE JAN PATTERSON: I think a lot of those death certificate people changed their minds.

MS. EADS: No.

CHAIRMAN BABCOCK: Okay. Here's your vote. This will give you a lot of guidance, Sarah. The death certificate picked up nine votes. The magic language picked up six votes, and the David Peeples "Let's deal with specific problems" got eight votes. So --

MR. ORSINGER: How did you determine voter intent?

CHAIRMAN BABCOCK: If you think I'm going to inspect your dangling chads, you've got another thing coming.

Okay, Stephen. Let's get the housekeeping out of the way.

MR. YELENOSKY: In the past -- and it was probably extravagant -- we had materials of anything we were going to look at was made available here, and I understand that that can't be done. It's expensive and probably is a waste of paper, so we have been getting e-mails and some direction to websites which happens over weeks prior to coming here.

I, for one, and maybe others, am not able to turn my attention to that as it comes through over the weeks prior to the meeting, but a day or two at some designated point right before the meeting I can, and it would be nice if we got one final e-mail that said, "Okay, This is what you need to bring and you can get it off the

website, or if you can't get it off the website, here it is, or you can find it here" because --

MS. SWEENEY: That would be nice.

MR. YELENOSKY: -- I couldn't put together what I needed for this meeting.

CHAIRMAN BABCOCK: Yeah, let me try this suggestion. What if we endeavor to get our stuff to Carrie that we want to prepare as an aspirational goal one week before the meeting, but in any event absolutely, positively, no later than close of business on Wednesday before the meeting, and then we'll send out an agenda that will have broad categories of documents, you know, well in advance of the meeting. Broad categories of agenda items, but then on the Thursday morning before the meeting we will include everything that we've gotten on the agenda.

MR. LATTING: So we can do one download?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Well, it's more than one download. You have to go to the web page and download each document.

MR. LATTING: But we can do it in one session.

CHAIRMAN BABCOCK: Don't talk over each other. Judge Patterson.

HONORABLE JAN PATTERSON: If you, as

documents come through -- and I think that there is a reason why they come through early as well as later, because people are looking at them, but if they are numbered so that if they are later superceded, you no longer need Document No. 5, at the end you could refer to the number or with the title say, "Bring documents" -- "make sure you have 1, 10, 12, 13," you know, however you designate them.

CHAIRMAN BABCOCK: Yeah, but who's going to number those?

HONORABLE JUDGE PATTERSON: Well, they are numbered as you send them out, so it's an automatic.

MR. LATTING: No, I don't want to do that. I don't want to have to keep all these things for weeks.

HONORABLE JAN PATTERSON: Well, I would like -- you can't tell what supercedes except by --

MR. ORSINGER: Why don't we date everything? Could we date everything?

CHAIRMAN BABCOCK: What Judge Patterson's point is, if she gets a December 4th memo from Dorsaneo and then he supersedes it with a December 10 memo --

HONORABLE JAN PATTERSON: He supersedes it three times.

CHAIRMAN BABCOCK: At least.

HONORABLE JAN PATTERSON: So that all we

need is Document No. 10 at the end.

CHAIRMAN BABCOCK: Right. And what you would like to see -- that to me -- I mean, the problem is so many people are putting stuff into our system.

HONORABLE JAN PATTERSON: That would only work if it came everything from Carrie and if she could number the flow as everything was numbered.

MR. YELENOSKY: I don't know if there's a solution to that, but what you've suggested solves my problem because it sounds like we can go in on Thursday morning, read one e-mail, and find everything that's current from that one e-mail, whether or not we have to dump stuff we've got before, and that solves my problem.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: As an alternate suggestion, if we can get the most recent version on the website then we can check -- the day before we come we could just download the stuff that's on the web page on that day and we know that's what we need.

CHAIRMAN BABCOCK: That's what we said.

HONORABLE JAN PATTERSON: That's what we just said.

CHAIRMAN BABCOCK: That's not an alternative. Steve.

MR. TIPPS: For my secretary, who gets all

of Carrie's e-mails -- I forward them immediately to her -- and me what works is having an agenda on Wednesday or Thursday that lists everything that we need to have so that this kind of book can be put together.

MS. BARON: That's not fair.

MR. TIPPS: Just forward the e-mails to Nora Zamora.

MR. YELENOSKY: Just have her make two copies.

MR. ORSINGER: You've got a secondary market in agendas.

CHAIRMAN BABCOCK: There's one other wrinkle to this. If you get your stuff in a week before the hearing, there's no question we can get it posted and it can be on the final agenda. If you start dribbling stuff in, you know, one, two, three days before the -- or two days before the meeting then there's a chance that if Carrie gets inundated with all this stuff we can't get everything posted on the website. So you may come to the meeting without all of the documentation that you need, so everybody has got to try to get it to us a week before the hearing now -- a week before the meeting. Now, if there's one or two documents we can probably do it if there's an emergency, but as an aspiration let's try to do that.

HONORABLE JAN PATTERSON: That said, thanks

to Carrie because she does a great job, and I know she's bombarded with it.

MS. SWEENEY: Yeah. Yea, Carrie.

HONORABLE SARAH DUNCAN: How about on top of e-mails if you don't get it to Carrie by the Friday preceding the meeting you've got to bring your own copies?

CHAIRMAN BABCOCK: That would be a nice rule, I think.

HONORABLE JAN PATTERSON: Sounds like a death certificate to me.

MS. SWEENEY: Can I raise my bigger tables point again?

CHAIRMAN BABCOCK: Go ahead.

MS. SWEENEY: I do not have enough room for all of my technology on this table. What do we have to do to get the Bar to give us normal, adult-sized tables?

MS. GAGNON: I've asked. I've talked to two different people for it. We're supposed to have them next time.

MS. SWEENEY: Yea. Really? Thank you.

CHAIRMAN BABCOCK: Okay. Next time is March 30 and 31. The Bar is giving us a little hassle about having this room again, but we think it's going to be here.

We got Steve's housekeeping. Everybody sign

in. Don't forget to sign in. And Carrie, just so everybody knows, is going to have a little minor surgery starting January 23rd, so if you don't hear from her for a week or two then that's why, not because she doesn't love you all. So we're in recess. Thanks, everybody.

(Meeting adjourned at 12:16 p.m.)

* *

CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 13th day of January, 2001, Saturday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,051.50 .

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

Given under my hand and seal of office on this the 23rd day of January, 2001.

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