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SUPREME COURT ADVISORY COMMITTEE VIDEO/TELECONFERENCE

TRAP RULES MEETING

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COPY

Taken before Patricia Gonzalez, a Certified
Shorthand Reporter in Travis County for the State of
Texas, on the 26th day of February, 2002, between the
hours of 12:00 p.m. and 1:30 p.m. at the offices of
Jackson Walker, L.L.P., 100 Congress, 11th Floor,
Austin, Texas 78701.

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Votes taken during this session are reflected on the following page:

16

1 PROFESSOR DORSANEO: All right. Ladies
2 and gentlemen, the first agenda item is Rule 9.5 --
3 Appellate Rule 9.5; it has a companion, 52.7.

4 At our last meeting, we made one minor
5 suggested revision in the Court's return draft to
6 9.5(a), and just for the record, we recommended,
7 although I don't think a vote was actually taken,
8 Mr. Chairman, to the Court to add the word "appellate"
9 before the word "proceeding" in 9.5(a), such that the
10 current words "appeal or review" are replaced by two
11 new words, "appellate proceeding."

12 With respect to the Court's proposed
13 comment, that comment needs to be identified as a
14 comment to 2002 change in the same manner that the
15 other comments are identified, but beyond that, it is
16 my view that the comment is fine, and I think that is
17 what we concluded at our last meeting.

18 At our last meeting, we decided to make
19 the original proceeding modification in Rule 52, and
20 it would be located, I believe, in Appellate Rule
21 52.7(c). Let me look at the rule book to see if I
22 still agree with that. Yes, 52.7 is called "Record."
23 52.7(a) is entitled "Filing by relator required," (b)
24 is "Supplementation Permitted," and I propose to add,
25 in the subcommittee's behalf, "(c)," entitled,

1 "Service of Record on All Parties."

2 I sent everyone, indirectly, through
3 Debra or otherwise, a draft of a memo dated February
4 7, 2002, which contains my effort to draft language
5 that would match what was suggested to be done at our
6 last meeting, and as my note on Page 2 of the February
7 7, 2002 memorandum indicates, the language is a little
8 bit complicated. I think it is serviceable, but over
9 all these many years, I have learned not to be
10 completely optimistic about the fate of suggested
11 language. So it's before you, and what do you think?

12 CHAIRMAN BABCOCK: Anybody who speaks
13 probably ought to identify themselves, because we have
14 a court reporter in Austin. Right, Deb?

15 MS. LEE: Yes, sir.

16 CHAIRMAN BABCOCK: Taking all this down.
17 So anybody have any comments on this?

18 MS. BARON: This is Pam Baron. I think
19 it's fine. And Jan has a note here that she says it
20 looks okay, also.

21 MR. GILSTRAP: Chip, this is Frank
22 Gilstrap. I'm not sure -- I mean, I understand where
23 we're going with it, but, frankly, the phrase "another
24 original proceeding filed with the same or another
25 appellate court" -- I mean, what that's referring to

1 is another original proceeding arising out of the same
2 matter, or it could -- what we're talking about is, if
3 you filed the original proceeding in the Court of
4 Appeals, then you don't have to refile the same
5 records when you go to the Supreme Court. I think
6 that's the intent, but the phrase "another original
7 proceeding" could encompass a lot of things.

8 PROFESSOR DORSANEO: Well, my intention
9 was to talk about not serving a duplicate record in
10 all of the circumstances where that would arise, not
11 merely in a series of mandamus proceedings that go
12 first to a court of appeals and then to the Supreme
13 Court. That's a little bit beyond what we talked
14 about, but it seemed that the spirit of the discussion
15 was not to require people to be serving things that
16 they've already served.

17 I tried to make it -- draft it to be
18 required that you would identify what you have said
19 you had already served through the use of the index
20 listing language that was in the Court's proposal as
21 the only vehicle, but, yes, Frank, my idea was, if
22 there's one original proceeding filed in the appellate
23 court and you served that record, you don't need to
24 serve it on the same party in connection with another
25 original proceeding filed in the same or another

1 appellate court, including --

2 MR. GILSTRAP: I guess that's implicit
3 that --

4 PROFESSOR DORSANEO: -- all of the other
5 appellate courts --

6 THE REPORTER: Hold on. Hold on. Both
7 of you are talking at the same time.

8 PROFESSOR DORSANEO: -- with the courts
9 to include the Supreme Court. And again, if an index
10 listing the materials filed and describing them in
11 sufficient detail is served on the party at the same
12 time the materials are filed in the other original
13 proceeding, meaning the later original proceeding --
14 now, the devil is in the detail in drafting this
15 language, but I, too, think it's fine if you want to
16 make it that versatile.

17 MR. GILSTRAP: Bill, are you envisioning
18 that possibly -- maybe separate underlying suits or
19 are we always talking about the same underlying suit?

20 PROFESSOR DORSANEO: I don't care. The
21 idea was, if you served documents on somebody, you
22 shouldn't have to copy them over again and serve them
23 all over again on the same person. I think that you
24 need to tell the person that you served that they're
25 the same things, and the index seems the best way.

1 MR. GILSTRAP: So the key phrase is
2 "served on the same party."

3 PROFESSOR DORSANEO: If you try to draft
4 it in too refined a manner, Frank, what you end up
5 doing is, you end up leaving things out that later you
6 would say, "I wonder why that's different." If you
7 try to cover everything in specific language, it's
8 going to get to be about a page long.

9 MR. GILSTRAP: So the idea is, if I've
10 been served with a piece of paper, I don't have to be
11 served with the same piece of paper. That's pretty
12 much it. Right?

13 PROFESSOR DORSANEO: Yes, but you have
14 to be told that you were served with it before.

15 MR. GILSTRAP: I see where you're going.
16 I understand it. It seems to make sense to me, then.

17 HON. DUNCAN: I hate to be the -- this
18 is Sarah, and I wasn't at the last meeting. Is this
19 really a big problem, because we're creating a lot of
20 problems for briefing purposes. If there's not one
21 record that everybody's using so that everybody's page
22 numbers are the same, how am I supposed to identify
23 page numbers in my brief if I'm relying on a record I
24 was served five years ago in another case?

25 (Voice in the background)

1 THE REPORTER: I can't hear that.

2 CHAIRMAN BABCOCK: Yeah. Somebody is
3 going to have to speak up if they're talking for the
4 record.

5 MR. EDWARDS: Well, this is Bill
6 Edwards. I think that's a good point.

7 PROFESSOR DORSANE0: I think that's a
8 good point, too.

9 CHAIRMAN BABCOCK: Got a way to fix it?

10 PROFESSOR DORSANE0: I don't know how to
11 deal with it, because --

12 JUSTICE HECHT: This is Hecht. I've
13 never seen anybody use --

14 PROFESSOR DORSANE0: -- I think it would
15 be inevitable that the pagination is going to be or
16 might well be different.

17 HON. DUNCAN: I don't have -- if the
18 intent were limited to successive mandamus or original
19 proceedings in a court of appeals and the Supreme
20 Court and it's the same record that you're using in
21 both courts, I don't have a problem with not reserving
22 that same document -- compilations of documents, but
23 this rule is far broader than that.

24 MR. EDWARDS: Well, this is Bill
25 Edwards. I don't have any problem with not having to

1 serve them in another appellate proceeding in the same
2 case, you know, that -- sometimes we see a pile of
3 records that are filed two or three separate times in
4 different aspects of the case. There may be two or
5 three mandamuses in discovery, for example. I don't
6 have any problem with that, but going to cases that
7 are not related to the underlying set of facts seems
8 to me to be going a bit far. You know, you have
9 lawyers --

10 HON. DUNCAN: But, Bill, you're going to
11 have the -- you're going to have the page numbering
12 problem if everybody is relying on a different record
13 in one proceeding, which, if you have ten discovery
14 mandamuses arising out of the same underlying lawsuit
15 and each one of them has a different record, if all I
16 have to do is tell all of the other parties what
17 documents I'm relying on, then everybody is going to
18 have different page numbers, and we, as a Court, are
19 not going to have any easy way to check those record
20 references without pulling archived cases from the
21 storage facility.

22 MS. BARON: My experience is that the
23 record in a mandamus proceeding isn't Bates stamped
24 consecutively. Basically, what you have are different
25 either numbered or lettered tabs behind which you will

1 find the document that was signed by the trial judge
2 or by the party and submitted in the trial court, and
3 normally, what I would do is, I refer to an exhibit by
4 the tab number, by the title of the document and the
5 page of that document. So I'm not sure that it's a
6 big problem. As long as you've identified the title
7 of the document and the tab that you've included it
8 behind, it should be accessible to everybody.

9 HON. DUNCAN: But, Pam, it's not going
10 to be the same tab in different mandamus proceedings,
11 necessarily. Right? So people are going to be -- and
12 everybody is not going to attach it --

13 MS. BARON: Well, you have to file --

14 HON. DUNCAN: -- as an appendix.

15 MS. BARON: You have to file a record in
16 every mandamus proceeding with the Court. That hasn't
17 changed. And then you have to have an index --

18 PROFESSOR DORSANEO: Have an index under
19 this.

20 MS. BARON: And you have to have an
21 index of that record that indicates each tab in each
22 document. So everybody will have the references of
23 tabs and the documents, and you can gather those from
24 your existing file and put them together. It's
25 just -- there is an inconvenience in copying the same

1 stuff over and over and over again, and it is a huge
2 amount of paper, usually, and handing it around to the
3 six people who have identified themselves as counsel
4 for the other side.

5 HON. DUNCAN: This also assumes that
6 either the counsel remain the same or that new counsel
7 has a complete file --

8 MS. BARON: Well, it says it has to
9 be --

10 HON. DUNCAN: -- or has access to all --

11 MS. BARON: It says it has to be the
12 same counsel, doesn't it, or just the same party --
13 you're right.

14 PROFESSOR DORSANEO: You know, the
15 Court's recommendation was, in 52.7(c) that they sent
16 back to us, was simply to do an index, "for later and
17 any party who files materials for inclusion in the
18 record must, at the same time, serve on all other
19 parties, an index listing the materials filed,
20 describing them in sufficient detail or identify them
21 in the underlying proceeding." I mean, I pick up on
22 that, but I'd also say that you have to serve the
23 documents unless you've served them before.

24 (Voice in the background)

25 THE REPORTER: I can't hear.

1 PROFESSOR DORSANEO: And the current
2 rule is you don't serve anything. So I think the
3 pagination problem is a problem, but I don't think
4 it's necessarily the biggest problem, and there are --
5 I won't say this rises to the level of being a tragic
6 choice, but there are choices that we have to make.

7 (Laughter)

8 CHAIRMAN BABCOCK: Sarah, could you
9 hear --

10 PROFESSOR DORSANEO: I don't have it
11 drafted to make the pagination problem go away.

12 (Voice in the background)

13 THE REPORTER: I can't hear.

14 HON. PATTERSON: Speak up for the
15 reporter, please.

16 MS. CORTELL: I'm sorry. This is Nina
17 Cortell, and I'm just saying, we could require that
18 the record be prepared in the same fashion as below
19 except for any new matters added at the end. I mean,
20 again, I don't know if we want to micro manage this,
21 but that would be one way to do that.

22 PROFESSOR DORSANEO: I'm ready to do
23 whatever you-all want, but I will also say that I sent
24 you this memo out on February 7th, 2002.

25 (Laughter)

1 CHAIRMAN BABCOCK: Sarah, what do you
2 think?

3 PROFESSOR DORSANE0: Whatever inference
4 you want to draw from that.

5 (Laughter)

6 PROFESSOR DORSANE0: Do you want to
7 think about it and go on to the next one?

8 MS. BARON: I like it the way it is.

9 MS. CORTELL: The only amendment to
10 consider would be, it's the same -- it's the same
11 case. In other words, to avoid the problem --

12 THE REPORTER: Can you speak up, please.
13 This is the court reporter.

14 PROFESSOR DORSANE0: Nina, you need to
15 be louder again.

16 MS. CORTELL: I was just saying make it
17 one case. I mean, just make it -- the one change
18 would be to make -- we're talking about in the same
19 case.

20 CHAIRMAN BABCOCK: Bill, why don't we
21 see how many people like it the way it is. What do
22 you think?

23 MR. EDWARDS: Chip, this is Bill
24 Edwards. One suggestion I'd make, down there where
25 we're describing the different proceedings, we say --

1 we use the term "another" and then "other" in the last
2 five lines.

3 CHAIRMAN BABCOCK: Right.

4 MR. EDWARDS: It seems to me it would be
5 clearer if we said, "in connection with a prior
6 original proceeding," and then "the last set are filed
7 in a succeeding or a later" -- either word --
8 "proceeding," because it had not already been filed if
9 this thing doesn't apply. So we're talking about a
10 prior original proceeding and a later or successive
11 original proceeding, I think.

12 CHAIRMAN BABCOCK: Bill, what do you
13 think? Dorsaneo.

14 PROFESSOR DORSANEO: I don't have a
15 problem with that. I mean, I've worded it about six
16 different ways, and that was one of the ways.

17 MR. EDWARDS: Or "previously filed in
18 another proceeding," something like that.

19 CHAIRMAN BABCOCK: Yeah.

20 PROFESSOR DORSANEO: Well, you can't
21 tell me "Something like that." You've got to tell me
22 what you want to change --

23 MR. EDWARDS: Well --

24 PROFESSOR DORSANEO: -- because I worked
25 on this for -- you know, over and over again, and I'm

1 not saying that I mind working on it some more, but as
2 I understand it, today is the day.

3 MR. EDWARDS: Well, this is Bill
4 Edwards. I'm trying to identify, with a little more
5 particularity, what "another original proceeding" is
6 as compared with "other original proceeding," and I
7 think what we're saying is, we're talking about a
8 document previously filed in another original
9 proceeding, and we're talking here about filing the
10 index in this proceeding.

11 PROFESSOR DORSANEO: Well, how about if
12 you file two of them simultaneously in the Court of
13 Appeals, one mandamus and one something else.

14 MR. EDWARDS: Well, you know, if you
15 want to get into that, then you just have to -- we're
16 talking about letting the tail wag the dog at that
17 point. You're just going to copy them twice.

18 PROFESSOR DORSANEO: Do you really think
19 there's -- I don't think there's a clarity problem
20 here, really. I think it's plenty clear. Maybe you
21 don't want to do this. Maybe you want to do Court of
22 Appeals/Supreme Court rather than saying Court of
23 Appeals. Maybe you want to do what Nina said, is
24 somehow trying to identify the underlying proceeding,
25 which is not all that easy to do either, since we're

1 not really talking about a whole proceeding, we're
2 talking about a piece of a proceeding, or maybe no
3 proceeding at all.

4 (Brief Pause)

5 PROFESSOR DORSANEO: I don't really mind
6 putting some burden on the person who's gotten the
7 copies to try to figure out how to do record
8 references.

9 CHAIRMAN BABCOCK: Justice Hecht, what
10 do you think? How do you and Chris feel about the
11 language as Bill is proposing it -- as Dorsaneo is
12 proposing it?

13 JUSTICE HECHT: I thought it was clear
14 enough, but I -- it needs to be clear to everybody,
15 but it struck me as being fine.

16 HON. PATTERSON: This is Jan Patterson.
17 I'm fine with it, too.

18 CHAIRMAN BABCOCK: How many -- we've got
19 two or three votes for that. How many people feel
20 that the language is clear enough as it is?

21 MS. BARON: This is Pam, I do, and
22 Justice Patterson says she does.

23 CHAIRMAN BABCOCK: All right.

24 MS. BARON: So we're unanimous here in
25 Austin.

1 MR. EDWARDS: Bill Edwards, I --

2 PROFESSOR DORSANEO: Unanimous in
3 Dallas.

4 CHAIRMAN BABCOCK: Okay. Well, that
5 sounds like a consensus to me. So why don't we just
6 keep the language as it is and move on to the next
7 topic, Professor Dorsaneo.

8 PROFESSOR DORSANEO: I'm confident that
9 if Justice Hecht doesn't like the language that it
10 would not stay the way it is.

11 (Laughter)

12 CHAIRMAN BABCOCK: Let's go to the next
13 one, Bill.

14 PROFESSOR DORSANEO: Okay. The next one
15 is 33.1. And I need to apologize to the committee for
16 not looking back at the work that we actually did in
17 making recommendations the last time around to the
18 Court. The background of this doesn't really begin
19 with former Appellate Rule 52(d) in terms of our last
20 recommendation to the Court. It begins with Clarence
21 Guittard's rewrite of 52(d) and the recommendations
22 made to the Court in 1996 that changed the appellate
23 rules.

24 At our last meeting, you know, Richard
25 Orsinger pointed out that the language that I tried to

1 reinstate from Rule 52(d) has some problems. I think,
2 ultimately, at the last meeting, you know, some of us
3 began to see that Richard was probably right, although
4 I know I didn't like hearing about the existence of
5 problems, just like so many of my students don't like
6 to hear about problems. They just want to know what
7 it is they're supposed to do.

8 So when I went back and looked, I found
9 that Justice Guittard had redrafted the language in a
10 manner that was fairly similar to what I think our
11 consensus was at the last meeting, that you don't need
12 to go into any kind of great detail about the exact
13 nature of the sufficiency problem, that, in a non-jury
14 case, a complaint regarding legal or factual
15 insufficiency of the evidence, including a complaint
16 that damages found are excessive or inadequate, may be
17 made for the first time on appeal and just perfectly
18 sufficient to make everything clear.

19 Now, Justice Guittard had this other
20 language in his draft, or words pretty close to it
21 which I think we ought to incorporate, "As
22 distinguished from a complaint, the trial court erred
23 in refusing to amend a fact finding or to make an
24 additional finding of fact." I don't know that that
25 language is strictly speaking necessary, but I don't

1 think it hurts anything. And I think it does point
2 out that there's a distinction between a complaint
3 about the refusal to make an additional -- or to amend
4 a fact finding and a straight up legal or factual
5 sufficiency complaint about a finding that was made or
6 should have been made.

7 So my recommendation is to do Option 1,
8 which will be pretty close to the recommendation we
9 made to the Court that they did not want to follow in
10 1996. I think they didn't want to follow it in 1996
11 because they didn't think it was necessary, and that
12 may well be right, but it's helpful to have it this
13 way.

14 My Option 2 language is a more
15 complicated version of Option 1 that I don't really
16 recommend, and that, really, basically finishes my
17 recommendation on 33.1(d).

18 CHAIRMAN BABCOCK: Does anybody have any
19 comments?

20 HON. PATTERSON: Jan Patterson, I like
21 Option 1.

22 CHAIRMAN BABCOCK: Decisive, as usual.

23 MS. BARON: This is Pam Baron. I agree.

24 CHAIRMAN BABCOCK: Does anybody else
25 have comments?

1 MS. CORTELL: We agree in Dallas.

2 CHAIRMAN BABCOCK: Justice Hecht, any
3 dissent from Option 1?

4 JUSTICE HECHT: No. I think 1 is better
5 than 2, and the only question the Court had was
6 whether to put either one of them in there. They'll
7 just have to decide.

8 THE REPORTER: Can you speak up? I'm
9 sorry. I'm having trouble hearing you, Justice Hecht.

10 JUSTICE HECHT: Yeah. I prefer Option 1
11 to 2 myself, and the question the Court had was
12 whether to put either one in the rule, but if we're
13 going to do one, I hope we're going to do Option 1.

14 CHAIRMAN BABCOCK: Well, I think that
15 the recommendation of our committee is Option 1, and
16 Bill Dorsaneo, we think that the Court ought to do
17 Option 1. Right?

18 HON. PATTERSON: This is Jan Patterson.
19 I think it is helpful to have a rule on this, and I
20 think this is a good rule.

21 MR. GILSTRAP: Yeah. Let me add my
22 endorsement to that. This is Gilstrap. I think I've
23 seen some court of appeals cases where they have
24 expressed some confusion at the elimination of 52(d).
25 They're not sure what it means.

1 JUSTICE HECHT: Well, there's at least
2 one out of the El Paso Court of Appeals.

3 MR. GILSTRAP: Wyler, I think.

4 JUSTICE HECHT: Yeah. As I think I told
5 the committee at the last meeting, the question that
6 came up in our consideration of the recommendation was
7 whether to just have a blanket rule that you always
8 have to preserve the point you're making in the
9 appellate court. I, myself, am convinced, from the
10 history of our practice going back over the 60
11 rules -- 60 years we've had the rules, that that would
12 be too great a departure from the expectation of the
13 Bar, but we'll see what the Court says.

14 CHAIRMAN BABCOCK: Okay. Should we go
15 on to the next one, Bill?

16 PROFESSOR DORSANEO: Yes. The next
17 one -- I don't know whether, Justice Hecht, you think
18 we ought to do -- try to do 38 now or do some of the
19 other ones first. I mean, 38 is -- I really need some
20 guidance, as I said in my memo, and the Court's
21 recommendation back to us was to consider carefully,
22 you know, the approach taken in the federal rules,
23 Federal Rule 28(a).

24 In my little memo, I tried to point out
25 that in addition to 28(a) there is a Fifth Circuit

1 local rule that provides a little more information on
2 how this process would be handled. Other changes
3 would be necessary. Frankly, I probably, when I
4 didn't hear back from anybody, should have continued
5 to draft. My bias, after consulting various people,
6 including committee members, was to take the more
7 simple approach to add a Rule 38.10 as the Court
8 suggested as a less sweeping change that might have as
9 much benefit -- you know, a new subdivision or Rule
10 38.10 providing that in cases with parties that are
11 not simply aligned or are on opposing sides to the
12 same issues of briefing schedule, including
13 consolidated briefs, must either be ordered or agreed
14 to with Court approval.

15 Justice Hecht -- in the Supreme Court
16 package that you had, where is the provision that was
17 going to be used by the Court to deal with this issue
18 at the high court level?

19 JUSTICE HECHT: We wouldn't -- we don't
20 want to change it at the high court. What we want to
21 do at our court, and I don't -- I assume that the
22 Court of Criminal Appeals doesn't even have the
23 problem, or else it's so minimal that it wouldn't
24 matter. We like the petition/cross-petition practice
25 because the pages are so limited. So it really

1 doesn't bother us. In fact, it's useful to have one
2 petitioner come in and say, "These are our
3 complaints," and have a response to that and a reply,
4 if there is one, and then have another petitioner come
5 in and say, "These are our complaints." And if there
6 are as many as -- sometimes in agency cases, there may
7 be five, six, seven, eight petitions filed, and
8 responses, and usually that's not -- that's helpful
9 rather than hurtful. And then on the briefing, there
10 will be some few cases that it comes up, you know,
11 maybe dozens a year, that if we think that we want
12 consolidated briefing, we'll just tell everybody, "Get
13 together on the briefing" or "Submit a proposal," or
14 something.

15 And so the question at our table was,
16 "Would this help the courts of appeals or the practice
17 in the courts of appeals?" I didn't sense much
18 interest in it at the last meeting from the judges,
19 and I didn't sense any from the lawyers, but I don't
20 know if that was accurate or not.

21 PROFESSOR DORSANEO: Well, I guess we
22 have three options. One is to do nothing at all and
23 to leave it the way it's currently crafted, with the
24 90-page outer limit, recognizing that occasionally
25 lawyers with -- well, even experienced lawyers might

1 run out of pages before they realize it at the back
2 end, but if we're going to have page limits, that's
3 kind of inevitable, because if you don't have the
4 pages, you're going to run out of pages. If you try
5 to do it the way the federal rules are drafted with a
6 page limit, we end up doing a lot of drafting work,
7 but the page limit problem doesn't go away. If we
8 assume that -- before, our current rules, we did it in
9 a manner that's similar to the federal rules, the
10 appellee including what we used to call, you know,
11 cross-points to get a better judgment, then that
12 appellee has fewer pages to do or has more work to do
13 in the same number of pages -- or in that sense, fewer
14 pages. I think it's just inevitable that somebody is
15 going to come up short on pages if they have to do
16 more than what somebody else has to do.

17 Some people commented that the federal
18 rules are worse than our state rules on that issue,
19 particularly in certain contexts that come up in a
20 relatively, you know, routine number of cases. So I'm
21 not confident that saying "Doing it like the federal
22 rules," even increasing the number of pages on
23 principle, "Raise the 50," does anything more than
24 have us have another more complicated system.

25 If we have something like 38.10, the

1 courts of appeals -- like Fort Worth Court that want
2 to do something -- will have a rule basis for doing
3 it. I'm not sure if it should be restricted to
4 briefing schedules. Maybe it should include argument
5 as well.

6 And those are my, kind of, jumbled
7 thoughts on the matter. Three options: Leave it
8 alone. Second option, try to monkey see, monkey do
9 the federal rule, because that's an engineered system,
10 even though that's going to leave us with some --
11 coming up short on fair allocation of page number
12 issues, perhaps worse ones than we have now. Third
13 one, putting something in a 38.10 that's a small
14 change that would be of interest to the people who
15 want to adjust our briefing process.

16 My preference is probably 3, but I am
17 not sure that leaving it alone wouldn't be a good
18 thing, too.

19 MS. BARON: Bill, I'm not --

20 (Simultaneous discussion)

21 MS. BARON: Go ahead.

22 MS. CORTELL: I do have a problem with
23 the six/three. I do think that this is probably more
24 of something where we ought to defer to what the
25 judges feel, because I think that's really where the

1 issue is, but as a practitioner, I find the six/three
2 mechanism wasteful and unnecessary, and I prefer the
3 federal system in that way, but the federal system
4 does have this inequity in the page allocation. No
5 doubt. If you are appellee/cross-appellant, you're
6 short under the federal rules.

7 But if we aren't going to go with
8 federal, then I would say you do nothing, because I
9 don't think that the current proposed 38.10 does
10 anything.

11 CHAIRMAN BABCOCK: Did everybody hear
12 that?

13 MS. BARON: Yeah. I'm not sure I agree
14 with that, because I think the 38.10 concept shows
15 that there's flexibility and it allows either on order
16 of the Court or on motion by any party, the Court may
17 permit, when there are multiple appellants, to put
18 your main points in your response brief or something,
19 just so that you -- I've had to file all of those
20 briefs in a case, and it didn't need to happen.

21 MR. GILSTRAP: Well, let me mention a
22 related issue, and that is, if we leave it as is, we
23 still have the nagging problem that the cross-points,
24 which is a holdover from the old practice, are still
25 in the Rules of Civil Procedure in 324(c), and I think

1 they are somewhere in the Rules of Appellate Procedure
2 as well. I mean, maybe that's not a problem, but it's
3 certainly inconsistent.

4 PROFESSOR DORSANEO: That's a part of
5 the appellate rules that needs further work. Right
6 now, the cross-point provision doesn't deal with, you
7 know, a cross-appeal where you're trying to get a
8 better judgment. It really only deals with preserving
9 the right to remand on reversal.

10 I quarreled the last time around with
11 where we ended up on the cross-point draft, which
12 leaves much of that entire subject to motion for
13 rehearing practice.

14 I think this needs further work that we
15 haven't done yet, if we're going to go to the federal
16 system, or even if we're going to mess with it very
17 much at all. And I'm prepared to do that work, but
18 I'm not prepared to do it this afternoon.

19 HON. PATTERSON: This is Jan Patterson.
20 I'm not convinced that we need to change it. However,
21 I do have some concern with 38.10, and that is that it
22 seems to me that it moves up the timetable to a time
23 that may not be meaningful for the Court. And by that
24 I mean, when a party makes an application of this
25 sort, I'm not sure that it can be meaningfully dealt

1 with by the Court at that early stage, and I wonder if
2 just an application can't be made without resort to a
3 new rule on that, because I think that does happen.
4 I'm not sure that 38.10 is necessary or helpful.

5 CHAIRMAN BABCOCK: Is Justice Duncan
6 still on the line?

7 HON. DUNCAN: I am.

8 CHAIRMAN BABCOCK: What do you think
9 about it, Sarah?

10 HON. DUNCAN: I'm not sure. I always
11 liked the federal system a lot, and I agree with Pam,
12 that there are cases that we get too many briefs and
13 too small briefs. I mean, there's -- you know,
14 frequently, there will only be a cross-appeal on trial
15 court regarding something as tiny as attorney's fees,
16 and it's a three-page brief, and you shouldn't have
17 had to go through the whole process of filing a
18 separate brief to raise that issue.

19 On the other hand, at least in our
20 court, this is so few of the appeals that we see, and
21 for people who really aren't very experienced with
22 multiple party appeals, the federal system is
23 incredibly confusing. So I'm not sure.

24 CHAIRMAN BABCOCK: Anybody else got any
25 other comments?

1 (No response)

2 CHAIRMAN BABCOCK: Well, it sort of
3 sounds to me, just listening to all of this, that the
4 leave-it-alone is the predominant feeling of our
5 group.

6 MR. GILSTRAP: I think leave it alone
7 for now. I think it needs some more work. I mean, I
8 think we need to look at it, but I don't think we need
9 to decide something today.

10 CHAIRMAN BABCOCK: Everybody okay with
11 that?

12 MR. WATSON: Yeah. This is Skip. I'm
13 okay.

14 PROFESSOR DORSANEO: I'm okay -- this is
15 Dorsaneo. I'm okay with it. And I think where we
16 would need to look is, frankly, in 38.2, "Appellee's
17 Brief," and the cross-point provision, which I regard
18 as -- have regarded, you know, since it was
19 promulgated as really inadequate, but it hasn't caused
20 any great trouble, I don't suppose.

21 CHAIRMAN BABCOCK: Okay. Should we go
22 on to the next one, Bill?

23 PROFESSOR DORSANEO: That will be fine
24 with me. That's 19.1, and really, it's 19.1 and 49.7,
25 and I apologize to Justice Hecht and to the Court for

1 not getting on this quickly enough.

2 We had a series of e-mails that I
3 suppose everybody is conversant with them, but the
4 19.1 problem involves the issue of the trial court's
5 plenary power. And 19.1 does not -- when it talks
6 about a motion for rehearing extending plenary power,
7 19.1 says, "The Court of Appeal's plenary power over
8 its judgment expires 60 days after judgment if no
9 timely filed motion to extend time or motion for
10 rehearing has been pending." It doesn't identify a
11 motion for en banc review as a species or subtitle of
12 motion for rehearing. Two courts of appeals -- that's
13 right, isn't it, Justice Hecht --

14 JUSTICE HECHT: Yeah.

15 PROFESSOR DORSANEO: -- have interpreted
16 19.1 that way, that motion for rehearing includes a
17 motion for en banc review, which extends the Court of
18 Appeal's plenary power. This could be made clear by
19 changing 19.1, and as I understand it from the
20 e-mails, that would be a small change that would be of
21 benefit to the Bench and the Bar.

22 If that's what you want to do, and I'm
23 perfectly prepared to recommend that, it would be
24 easily done in 19.1. I think if it's done in 19.1, it
25 should also be done in 53.7. 53.7 uses the same

1 reference in motions for rehearing. 53.7(a)(1), "The
2 petition for review must be filed with the Supreme
3 Court within 45 days after the following, the date the
4 Court of Appeals rendered judgment, if no motion for
5 rehearing is timely filed." And I think it works in
6 both places, although, frankly, 53.7 could be let be
7 and just 19.1 change. I don't see any down side to
8 changing 53.7, such that motion for rehearing in the
9 Court of Appeals clearly means -- or clearly includes
10 a 49.7 -- clearly includes a 49.7, you know, motion
11 for en banc reconsideration.

12 And that's a lot of numbers and some
13 jargon, but I think that's as probably clear as I can
14 make it. The idea would be to codify the San Antonio
15 and Fort Worth Courts' interpretation of 19.1(b) and
16 to extend that -- my second proposal would be to
17 extend that interpretation to the one other context --
18 and there may be others -- in which the problem pretty
19 clearly arises, 53.7(a) -- is that right -- 53.7(a) --
20 53.7(a)(1).

21 That's my story and I'm sticking to it.

22 (Laughter)

23 CHAIRMAN BABCOCK: Does anybody have
24 comments?

25 HON. DUNCAN: This is Sarah. I wrote

1 one of the opinions and honestly struggled with what
2 was intended and did the best I could. I think there
3 are really serious problems. So I'm all in favor of
4 clarifying it. I thought it was a brilliant piece of
5 analysis.

6 (Laughter)

7 HON. DUNCAN: I'm joking.

8 PROFESSOR DORSANEO: I think it got rave
9 reviews, Sarah.

10 HON. DUNCAN: Oh, really.

11 PROFESSOR DORSANEO: Your opinion, yeah.

12 CHAIRMAN BABCOCK: It's being talked
13 about in seminars across the state, Sarah.

14 Any other comments?

15 MS. BARON: No. I mean, I agree with
16 Bill and Sarah, that if we don't have this -- if it's
17 not included, we have all sorts of potential problems
18 in terms of time scheduling and plenary power. So it
19 needs to be there as a clean-up.

20 CHAIRMAN BABCOCK: Okay. Any dissenters
21 from this approach?

22 (No response)

23 CHAIRMAN BABCOCK: Justice Hecht, does
24 it look okay to you?

25 JUSTICE HECHT: Looks great.

1 CHAIRMAN BABCOCK: Okay. Well, Bill, I
2 think we can move on.

3 PROFESSOR DORSANEO: I have three other
4 matters that are kind of -- three other matters that
5 are off agenda, Chip, or slightly off agenda.

6 CHAIRMAN BABCOCK: Okay.

7 PROFESSOR DORSANEO: Do you want me to
8 go into those, or what's your pleasure?

9 CHAIRMAN BABCOCK: Yeah, sure. We're
10 all gathered.

11 PROFESSOR DORSANEO: These emanate from
12 the Court. And I'll take them, Justice Hecht, in
13 whatever order you'd like, but I'm looking at an
14 e-mail from Nathan Hecht dated February 13th, 2002,
15 dealing with two additional matters that have arisen.

16 The first matter, and I'll just read
17 from the e-mail, if I may, raised by one of the
18 justices on the Court is whether we should change --
19 meaning the Court should change TRAP 11 to accommodate
20 a concern of Federal Rule Appellate Procedure 29.4
21 that a court may refuse an amicus brief that would
22 require a judge or justice to recuse. A simple change
23 would be to add, after the first sentence of TRAP 11
24 which states, "An appellate court may receive but not
25 file an amicus brief," the following second sentence,

1 "but the Court, for good cause, may refuse to consider
2 the brief and order that it be returned with an
3 explanatory comment."

4 I don't have a problem with that. My
5 question to Justice Hecht or to anyone would be, "Is
6 recusal really required in the context of an amicus
7 brief?" If it is, then I have one view. If it isn't,
8 my view might be indifferent.

9 JUSTICE HECHT: This is Hecht. I don't
10 know the answer to that question, but I do know that
11 some years ago we got an amicus brief, as I recall, on
12 rehearing in a tax case in which I think the issue was
13 whether limestone was a mineral or not, but I'm a
14 little rusty on the --

15 MS. BARON: I think it was gravel.

16 JUSTICE HECHT: It may have been gravel
17 or something. And Judge Hightower had written the
18 opinion and we got an amicus brief from someone who
19 had some connection with his lawyer daughter, but not
20 very much of a connection, as I recall, and nobody
21 paid any attention to it -- I mean, to the
22 connection. In fact, I had no idea that even the kid
23 existed. I don't know whether Jack did or not, but it
24 certainly was nothing that seemed to catch anybody's
25 attention until it became an issue in his re-election

1 campaign that he should have recused himself on
2 rehearing, even though he had written the opinion in
3 the case, because of this amicus brief, and which, I
4 think, as -- again, it seems like the Court was not --
5 the opinion might have been unanimous, but it
6 certainly wasn't -- I don't remember it being any --
7 causing much division.

8 And so that's a small -- I don't think
9 that's what prompted this query from my colleagues,
10 because the ones who raised it weren't there at the
11 time, but more that, just, this might be a problem and
12 it might be more of a problem in the courts of appeals
13 as people file more amicus briefs.

14 And so I don't know if you have to
15 recuse, but I certainly wouldn't want to see a judge
16 feel like the judge had to choose between -- well,
17 have no choice but to get out of the case because
18 somebody filed an amicus brief.

19 CHAIRMAN BABCOCK: Bill, have you taken
20 this problem to your subcommittee yet?

21 PROFESSOR DORSANEO: No, not -- you
22 know, everybody got sent a copy of this, so yes and
23 no, but I would say probably the better answer is that
24 the subcommittee has not been forced to consider it,
25 only been sent it.

1 MS. BARON: Chip, this is Pam Baron.
2 I've written an article on amicus briefs, and my
3 understanding from the research I did, an amicus is
4 not a party to the case --

5 PROFESSOR DORSANEO: Right.

6 MS. BARON: -- in the Texas courts. The
7 briefs are not filed. They're just received, and as a
8 result, the recusal rules don't come into operation,
9 because they're not a party before the Court and the
10 recusal rules relate to parties only.

11 Now, there is an appearance issue, but
12 that is always going to be there, I would guess, but
13 as far as I know, there's no requirement of recusal.

14 CHAIRMAN BABCOCK: Okay. Where I was
15 headed was that perhaps this ought to be vetted a
16 little bit by the subcommittee and then brought back
17 to our full committee at a regularly scheduled
18 meeting, given the fact that we have a, you know,
19 relatively small turnout today.

20 MS. SWEENEY: Chip?

21 CHAIRMAN BABCOCK: Yes.

22 MS. SWEENEY: It's Paula. I just had
23 one question about this subject, which is, as you-all
24 reconsider it in the subcommittee, which I'm not on,
25 it strikes me that, if we're not careful, we run the

1 chance of reeking havoc with the litigants, because I
2 don't know that a litigant can prevent an amicus from
3 being filed, and you may end up with all kinds of
4 recusal problems if the litigants themselves, the real
5 parties in interest, would choose -- would not want to
6 have if you're not careful with how it's written.

7 CHAIRMAN BABCOCK: Yeah, I agree. I can
8 see a lot of mischief being worked by this if people
9 want to try to manipulate the system.

10 (Simultaneous discussion)

11 PROFESSOR DORSANEO: Well, we're happy
12 to consider it at the subcommittee level.

13 CHAIRMAN BABCOCK: Yeah. I think that's
14 a good idea, Bill.

15 (Simultaneous discussion)

16 CHAIRMAN BABCOCK: We'll put it on the
17 agenda as soon as you want.

18 What else do you have?

19 HON. DUNCAN: This is the subcommittee,
20 isn't it?

21 CHAIRMAN BABCOCK: Excuse me?

22 MS. BARON: Yes.

23 HON. DUNCAN: Is this --

24 (Simultaneous discussion)

25 PROFESSOR DORSANEO: I'm not really

1 sure. I tried to get clarification of whether this
2 was a subcommittee or whether this was the whole
3 committee, and I never was sure.

4 CHAIRMAN BABCOCK: This is a full
5 committee meeting today.

6 PROFESSOR DORSANEO: I assume --

7 MS. BARON: No. I think Sarah's point
8 is that the people who showed up are the subcommittee.
9 Right?

10 HON. DUNCAN: Right. So if we're going
11 to further discuss this, this would seem to be the
12 appropriate subcommittee in which to discuss it.

13 MR. WATSON: Chip, this is Skip.

14 CHAIRMAN BABCOCK: Yeah, Skip.

15 MR. WATSON: I think Sarah wants to talk
16 about it.

17 (Laughter)

18 CHAIRMAN BABCOCK: Well, I'm not trying
19 to cut off debate about it. That will be fine. I
20 wanted to be sure we got through our agenda that was
21 our published agenda.

22 MR. WATSON: I --

23 PROFESSOR DORSANEO: We have.

24 MR. WATSON: There's a consensus out
25 there that, you know, happening one time with Justice

1 Hightower creating a campaign issue may not merit
2 tinkering with the rule in creating a potential ground
3 for recusal that really is not there. It bothers me
4 to imply that an amicus could create a recusal. I
5 have not researched it like Pam, but, man, oh, man,
6 can I see mischief if we were to ever imply that that
7 could happen.

8 MS. BARON: Well, and then if you go
9 down that road, because an amicus is not a party, it's
10 really just like submitting a law review article to
11 the Court or something to the Court, well, then what
12 about a lawyer review article written by someone
13 related to the judge? It's not really that much
14 different.

15 HON. DUNCAN: Was that Skip?

16 CHAIRMAN BABCOCK: Except that something
17 that is directed specifically to the Court for the
18 Court's consideration and lots -- not lots of times,
19 but there are times when amicus briefs are cited in
20 court opinions.

21 JUSTICE HECHT: I don't know that -- I
22 respect Pam's view of the legal issue, and it
23 certainly seems like to me that that's right -- that
24 ought to be right, that amicus briefs ought not to
25 require recusal, but it could -- you know, a judge

1 might well think that it put him in a bind.

2 I agree that we ought not to suggest
3 that it would, because that's the mischief that my
4 colleagues who raised the issue want to avoid, and so
5 maybe it needs some more thought in that regard.

6 MR. WATSON: Judge, couldn't the Court
7 handle it internally just with -- I mean, I'm just
8 thinking out loud here, but with an internal rule that
9 if any justice in fact does have a problem like this
10 that the amicus could be returned with a note
11 explaining why.

12 JUSTICE HECHT: Yeah. I mean, I don't
13 think -- I'm not sure we need a rule; at least I
14 don't -- I wouldn't feel like on our court that we
15 needed a rule. Maybe other courts would disagree, but
16 as far as I know, that's the only time that it's ever
17 happened.

18 (Simultaneous discussion)

19 PROFESSOR DORSANEO: This is Dorsaneo
20 again. The other issue is, you know, the federal
21 court's view about amicus briefs I think is really
22 pretty different from our traditional, I believe,
23 healthier view, that amicus briefs are a good thing,
24 not a bad thing. I think that's our juris prudence,
25 generally, that courts are happy or at least don't

1 regard it as some sort of bad practice for amicus
2 briefs to be filed that aid the court in considering,
3 you know, complex issues. I guess we have a \$5 fee
4 for amicus briefs, but --

5 MS. BARON: There's no fee.

6 PROFESSOR DORSANEO: -- I even,
7 occasionally, forget the -- huh?

8 MS. BARON: There's no fee.

9 PROFESSOR DORSANEO: Supreme Court has a
10 \$5 fee.

11 MS. BARON: No.

12 PROFESSOR DORSANEO: At least that's
13 what -- does it?

14 MR. WATSON: That's what they tell
15 Dorsaneo.

16 (Laughter)

17 MS. BARON: Because it's not filed,
18 there can't --

19 PROFESSOR DORSANEO: Well, I sometimes
20 forget to pay it. Maybe I'm okay if they don't have
21 it and I forget to pay it, but I thought Chief Justice
22 Phillips said at a seminar at SMU that there was a \$5
23 fee. And I thought to myself when I heard that,
24 "Isn't that interesting, because I don't often send
25 that check."

1 MS. BARON: Well, he probably doesn't
2 necessarily know, Bill.

3 (Laughter)

4 UNIDENTIFIED SPEAKER: I wouldn't take
5 Tom's word on what the fees are.

6 (Laughter)

7 CHAIRMAN BABCOCK: Maybe it's just a
8 Dorsaneo rule.

9 PROFESSOR DORSANEO: This additional
10 sentence would say, you know, the Court can refuse to
11 consider the brief and order it returned in kind of an
12 open-ended fashion, but "The Court, for good cause,
13 may refuse to consider the brief and order that it be
14 returned." I can see that there would be a bunch of
15 reasons why the Court might want to do that, but I
16 can't see those cases happening very often.

17 HON. DUNCAN: This is Sarah. I,
18 frankly, have a problem with giving the Court
19 discretion over which amicus briefs it will choose to
20 receive. I realize there's not a free speech issue
21 here, but, to me, it's real close.

22 If somebody wants to express an opinion
23 on an issue that's pending before the Court, it seems
24 to me they ought to be able to do that, and I -- the
25 idea of recusal based on an amicus brief, as Pam

1 said -- it never occurred to me because it's not a
2 party, so I would prefer to do nothing.

3 MS. SWEENEY: I agree with the concern
4 about -- this is Paula -- rejecting briefs. I think
5 if somebody goes to the trouble to generate one and to
6 get their view before the Court, that they ought to at
7 least be entitled to have it submitted or filed or
8 tendered or received or whatever the right verbiage
9 is.

10 One question. Justice Hecht; you
11 mentioned -- I think it was you a second ago -- that
12 there's an increase in amicus filings. Do we know
13 that? Is there -- how often does it happen, some
14 cases, every case, most cases?

15 JUSTICE HECHT: I don't know about the
16 courts of appeals, of course, but in our court,
17 there's been a tremendous increase, which I agree with
18 Bill, I think that's a good thing.

19 My only regret is that it doesn't happen
20 more at the petition stage, because, you know, there
21 are a lot of -- as complex as our law is becoming,
22 there are a lot of important issues that affect a lot
23 of people, and you would hate for the resolution of
24 them to depend on whoever happened to have a case that
25 got there in propitious time.

1 So I think they're good, and we have
2 not -- no one on my court has ever complained, as far
3 as I know, about too many amicus briefs. We do get --
4 we haven't had this happen in a long time, but, for
5 example, in the school finance cases, we got "me-too"
6 briefs. We can get 50 amicus briefs that just said,
7 "We agree with one side or the other."

8 MS. SWEENEY: Is that helpful at all?

9 JUSTICE HECHT: No. That's not helpful
10 at all. I mean, this is not -- we're not taking a
11 vote.

12 UNIDENTIFIED SPEAKER: It's not up for
13 popular election.

14 JUSTICE HECHT: But what is helpful is,
15 somebody comes in and says, "Well, sure, that's their
16 problem, but looky over here, here's a big problem
17 over here, too," and take that into consideration when
18 you're worrying about that or hear some arguments that
19 for one reason or another somebody in the case before
20 you didn't choose to make. And then a lot of times we
21 get amicus briefs that says -- that do the 49-state
22 research that a lot of times parties don't have the
23 wherewithal to pay for them.

24 MS. BARON: My experience in the Court
25 of Appeals is that it's a rare case in which an amicus

1 is submitted. Is that true, Sarah?

2 HON. DUNCAN: It is in our court,
3 although -- I mean, it's happened -- I can think of
4 several times that it's happened, but it's still, in
5 volume terms, very rare.

6 PROFESSOR DORSANEO: So what's your
7 pleasure?

8 HON. DUNCAN: Do nothing.

9 CHAIRMAN BABCOCK: Hey, Deb.

10 MS. LEE: Yes, sir.

11 CHAIRMAN BABCOCK: This was not on our
12 published agenda for today. Is that correct?

13 MS. LEE: Yes, sir, it wasn't.

14 CHAIRMAN BABCOCK: Okay. If we had had
15 a full discussion and can call this at the
16 subcommittee level, then what I would propose to do
17 is, you know, at the March meeting or thereafter, we
18 just put this on the agenda, and, you know, talk about
19 it as much as we need to, but I'm hesitant to go ahead
20 and have a full committee vote without having put it
21 on the agenda. Does anybody disagree with that?

22 MS. SWEENEY: No.

23 MS. BARON: No, but I think it's the
24 subcommittee's consensus that we should do nothing.

25 CHAIRMAN BABCOCK: Yeah. And we can

1 just sort of announce that at the next meeting. So,
2 Deb, would you add this as an agenda item for the
3 March meeting.

4 MS. LEE: Yes, sir.

5 CHAIRMAN BABCOCK: You know, Bill can
6 just report that the subcommittee met under the cloak
7 of the full committee and we think we ought to do
8 nothing.

9 All right. Bill, are we done?

10 PROFESSOR DORSANEO: One more thing.

11 CHAIRMAN BABCOCK: Well, are we through
12 with the --

13 PROFESSOR DORSANEO: One more thing --

14 CHAIRMAN BABCOCK: -- agenda items?

15 PROFESSOR DORSANEO: -- in that same
16 category, Chip. It's a proposal for a change to
17 Appellate Rule 27.1 --

18 CHAIRMAN BABCOCK: Right.

19 PROFESSOR DORSANEO: -- which was
20 forwarded to all of us today from Chris Griesel --
21 isn't that right, John -- at 11:59.

22 MS. BARON: I did not get that.

23 PROFESSOR DORSANEO: It came in on
24 John's -- well, I can explain it. It came in on
25 John's black very wireless handheld machine that I

1 guess all big firm lawyers are issued. I need to get
2 one of those. And it also is addressed in Chief
3 Justice Hecht's e-mail of February 13, 2002, and I'll
4 just mention it.

5 The e-mail says a somewhat more
6 difficult matter raised by the Court is whether the
7 rule should provide that when an appeal can be filed
8 in more than one appellate court other than the First
9 and Fourteenth, the appeal should be heard by the
10 court designated in the first file, not with premature
11 notice. This has been the Court's procedure for some
12 time and there is interest in formalizing it so that
13 parties will know what to expect and will not argue
14 that other considerations are relevant. I hope to
15 have specific language in a day or so.

16 Now, I don't know that this is the
17 specific language, but the specific language for
18 adding to 27.1 that came in this late developing
19 e-mail from Chris Griesel is this, "When an appeal
20 arises from proceedings in a county served by more
21 than one court of appeals, a prematurely filed notice
22 of appeal does not establish dominant jurisdiction."
23 Okay? "When the appeal arises in" --

24 MS. BARON: Can you read -- can you read
25 it again?

1 PROFESSOR DORSANEO: I'll read it again.
2 Okay? Yes, I certainly can.

3 "When an appeal arises from proceedings
4 in a county served by more than one court of appeals,
5 a prematurely filed notice of appeal does not
6 establish dominant jurisdiction. Instead, dominant
7 appellate jurisdiction lies in the court identified in
8 the notice of appeal that is first filed after the
9 appeal becomes ripe for decision by the appellate
10 court," and then there's a comment.

11 There's a section for criminal cases,
12 too, that I haven't studied. It doesn't look any
13 different. There's a comment, "Change to Rule 27.1(a)
14 makes it clear that a prematurely filed notice of
15 appeal does not establish dominant appellate
16 jurisdiction when the parties to a single trial court
17 proceeding file competing notices of appeal. When an
18 appeal arises from proceedings in a county served by
19 more than one appellate court, dominant jurisdiction
20 lies in the court identified in the first notice of
21 appeal that is filed after the case becomes ripe for
22 appellate review."

23 And I'm at your disposal, Mr. Chairman,
24 whatever you would like to do about that.

25 CHAIRMAN BABCOCK: Well, again, since

1 that's kind of an off-agenda item, if you want to have
2 a brief discussion about it now, that will be fine, or
3 we can put it on the agenda for whatever full meeting
4 you want, you know, be it March or May.

5 JUSTICE HECHT: This is Hecht. It would
6 be helpful -- this comes up for us two or three or
7 four -- five times a year when somebody -- not very
8 often, but somebody files competing notices of appeal,
9 usually in Tyler and Texarkana. I don't even know
10 where else it happens.

11 CHAIRMAN BABCOCK: It can happen in
12 Dallas.

13 JUSTICE HECHT: Dallas and Tyler.

14 CHAIRMAN BABCOCK: And Tyler, I think,
15 yeah.

16 JUSTICE HECHT: We held, in a little
17 different context in the redistricting case, that the
18 court that has dominant jurisdiction is the first one
19 that gets notice of appeal after an appeal is subject
20 to being taken, when there's something to appeal,
21 and that was in the filing context, that -- I'm sorry,
22 not an appeal, but a court would get jurisdiction once
23 the circumstances --

24 PROFESSOR DORSANEO: Trial courts, yeah.

25 JUSTICE HECHT: -- for litigating became

1 ripe. And this has been the rule, in substance, that
2 we have followed in transferring cases back and forth
3 to courts when this comes up.

4 And the question was at our table
5 whether we ought to deal with it in a rule just so
6 people will know what's going to happen. And I guess
7 one question that would be helpful for me to know, if
8 anybody thinks there have been or ought to be
9 different considerations in deciding which case goes
10 ahead.

11 HON. DUNCAN: This is Sarah again.
12 That's why I'm not fond of the proposal. I do think
13 there are other considerations. If a court of appeals
14 has decided an appeal and remanded it back to the
15 trial court for a new trial or for further
16 proceedings, that court's jurisdiction over that case,
17 I don't think should end simply because somebody files
18 a notice of appeal in another court.

19 JUSTICE HECHT: I don't think we've ever
20 had that, although we have had -- I know it's happened
21 that cases have gone to some other court of appeals
22 after remand, just in the -- just because of the
23 transfer. I'm not sure that's a good thing, but --

24 HON. DUNCAN: It's a really cost
25 inefficient thing from my perspective.

1 JUSTICE HECHT: Well, it has --

2 HON. DUNCAN: Once --

3 JUSTICE HECHT: It causes a lot of
4 tension in the case just because you've got all of the
5 case problems and one court of appeals has held one
6 thing and it's gone back on remand and comes back up
7 and then it gets transferred to somebody else just
8 because of workloads and the second court is not so
9 fond of the first court's decision and -- or maybe the
10 second court would have been predisposed to rethink
11 it.

12 HON. DUNCAN: I was just thinking about
13 the learning curve on a case. I mean, we're trying
14 really hard in our court to ensure that proceedings
15 arising out of the same initial suit always get to the
16 same panel, because we're losing all of the benefit of
17 having the knowledge about the case that the judges
18 and the staff attorneys have, and this seems to go in
19 just the opposite direction, or at least potentially.

20 CHAIRMAN BABCOCK: Justice Hecht, how
21 time sensitive is this? Is this something the Court
22 wants our views on like right away or --

23 JUSTICE HECHT: Well, I think the answer
24 is probably yes, but I don't know if it has to be done
25 today. I don't --

1 THE REPORTER: I can't hear. I'm sorry.
2 You're fading out.

3 JUSTICE HECHT: I'm sorry. I think the
4 answer is, this is a more moment than other subsequent
5 things that have come up, just because, if we don't do
6 it this way, the Court may want to look at some other
7 way of resolving the issue, by order or something,
8 but -- I don't know that, but I just wonder if they
9 will, but we don't want to get it -- you know, I think
10 Sarah makes a good point. And I'd rather think about
11 it than rush into it, but maybe if we can put it on
12 the March agenda --

13 CHAIRMAN BABCOCK: Uh-huh, yeah.

14 JUSTICE HECHT: -- and the Court of
15 Criminal Appeals drag their feet, and probably will,
16 and then it will be timely anyway.

17 MS. BARON: Judge Hecht, this is Pam.
18 My recollection is the Court issued an opinion or an
19 administrative order that explained this in a
20 particular case. Is that not correct?

21 JUSTICE HECHT: I think that's right,
22 and I don't remember which it was, and it was in
23 another Tyler/Texarkana matter. It was a case
24 where -- I think it was an opinion where they had gone
25 racing down to the respective clerk's offices on cell

1 phones or whatever --

2 (Laughter)

3 JUSTICE HECHT: -- had the judge
4 actually put the ink on the paper, the judgment yet or
5 not, and I think we did right in that case.

6 MS. BARON: So there is written
7 precedent on how the Court deals with the issue, at
8 least when it's a non-previously remanded case.

9 JUSTICE HECHT: Right.

10 MS. BARON: Okay.

11 JUSTICE HECHT: And I think our problem
12 is -- I think what the Court's -- where they're coming
13 from is that they would rather not have to decide
14 these as contested matters from now on until the end
15 of time if it's possible to identify at least
16 satisfactorily what the competing considerations are
17 and settle them once and for all rather than having
18 some other case come in and say, "Well, sure that was
19 the case, but now, see here, we're a little different
20 because thus and so."

21 MR. EDWARDS: This is Bill Edwards. We
22 might want to have a term that's something a little
23 more precise than "the appeal becoming ripe for
24 decision." I don't know what that means.

25 CHAIRMAN BABCOCK: Debra, can you add

1 this to the March agenda as well?

2 MS. LEE: Yes, sir.

3 CHAIRMAN BABCOCK: That would be great.

4 MS. BARON: I think it would help at
5 that meeting if we had the cite or the opinion, too.

6 PROFESSOR DORSANEO: I will find that
7 and put it in my report.

8 JUSTICE HECHT: We'll send it out or
9 Bill will or somebody.

10 CHAIRMAN BABCOCK: Okay. That would be
11 great.

12 MR. GILSTRAP: I think it would also be
13 helpful just to identify the swing counties. I mean,
14 I think there's only three or four of them. It might
15 be nice to know which ones we're dealing with.

16 CHAIRMAN BABCOCK: Dallas and --

17 PROFESSOR DORSANEO: The opinion
18 identifies them.

19 MR. GILSTRAP: It does? Okay.

20 PROFESSOR DORSANEO: Yeah. My
21 recollection is, the opinion identifies them but --
22 and I'm sure it does so accurately, but I'll check.

23 JUSTICE HECHT: We may be the only state
24 in the country, but there's certainly -- you can count
25 them all on one hand -- that has as silly a

1 districting system as we've got. Most civilized
2 people would be embarrassed by it, but we're not, and
3 the legislature won't change it in spite of the fact
4 that they routinely and regularly instruct us to come
5 up with a plan for redistricting the courts of appeals
6 so that this won't happen. And it's far too early to
7 even turn to the district courts, which are a hopeless
8 mess, but -- in some areas of the state where they're
9 semi-overlapping and sometimes overlapping districts,
10 but maybe we can talk about this in March. That would
11 be good.

12 CHAIRMAN BABCOCK: Okay. It's now
13 officially on the agenda. Bill, do you have any other
14 items? Bill Dorsaneo.

15 PROFESSOR DORSANEO: Mr. Chairman, that
16 concludes the matters that I was prepared to present
17 today.

18 CHAIRMAN BABCOCK: Well, great job, as
19 usual.

20 PROFESSOR DORSANEO: That concludes my
21 reports.

22 CHAIRMAN BABCOCK: Great job as usual.
23 Do you have anything else?

24 (No response)

25 CHAIRMAN BABCOCK: Well, if nobody has

1 anything else, then we'll adjourn until March, which
2 is I guess -- what -- a week from this Friday, isn't
3 it?

4 MS. LEE: Yes, sir.

5 CHAIRMAN BABCOCK: Okay.

6 JUSTICE HECHT: Thanks to everyone for
7 all of your help as usual.

8 CHAIRMAN BABCOCK: You bet.

9 MS. SWEENEY: Hey, Chip, I really like
10 getting together -- this is Paula -- getting together
11 this way as opposed to hauling to Austin for --
12 certainly for shorter things like this.

13 CHAIRMAN BABCOCK: Yeah. Well, you
14 know, we were trying it out, and it, frankly, worked
15 better than I was expecting it to.

16 MS. SWEENEY: Well, thanks for making
17 your facilities and the service -- the call-in option
18 available, because, you know, I think you get more
19 participation than you would if you tried to get
20 everybody to haul to Austin, especially on a bridged
21 agenda.

22 CHAIRMAN BABCOCK: Yeah, absolutely.

23 MR. WATSON: Hey, Chip. Skip. Can you
24 get Oprah to build you an Amarillo office?

25 CHAIRMAN BABCOCK: Well, we're working

1 on one, Skip.

2 (Laughter)

3 CHAIRMAN BABCOCK: All right, guys.

4 Thanks so much.

5 (Proceedings concluded at 1:30 p.m.)

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6 I, Patricia Gonzalez, Certified Shorthand
7 Reporter, State of Texas, hereby certify that I
8 reported the above hearing of the Supreme Court
9 Advisory Committee on the 26th day of February, 2002,
10 and the same were thereafter reduced to computer
11 transcription by me. I further certify that the costs
12 for my services in the matter are \$506⁰⁰ charged to
13 Charles L. Babcock.

14 , Given under my hand and seal of office on
15 this the 1st day of March, 2002.

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