Chip:

Attached are two documents: (1) Proposed revisions of rules 306 and 306a and (2) a memo explaining these revisions and my thoughts.

Briefly: Revised rule 306 restates current law and puts it into one rule. If we want to do more than this, I offer amended rule 306a. Amended rule 306a does two main things: (1) It says that if the Lehmann language is not used in a judgment all timetables are delayed, and (2) it requires clerks to send a more thorough notice of final judgment and delays timetables if the notice is not received.

I have sent all this to the committee members by copy of this email, but I will bring hard copies of everything to the meeting Friday.

David

PROPOSED CHANGES IN RULES 306 AND 306a
(new language in *italics*)

Rule 306. ~~Recitation~~ *Finality* of Judgment *or Order*

1. Final judgment. ~~The entry of the judgment, shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.~~ *At the conclusion of the litigation, the court shall render a final judgment or order.*

2. Judgment after conventional trial on merits. *A judgment rendered after a conventional trial on the merits is presumed to dispose of all claims between all parties and is presumed to be final and appealable.*

3. Other judgments and orders. *A judgment or order rendered without a conventional trial on the merits is final only if it:*

(a) expressly disposes of all claims between all parties,

(b) is the latest of two or more orders that, considered together,

expressly dispose of all claims between all parties, or

(c) states with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that it is final as to all claims between all parties and is appealable.

4. Interlocutory judgments and orders. *Any judgment or order that does not comply with paragraph (2) or (3) remains interlocutory and is not final.*

Rule 306a. Periods to Run From Signing of Judgment or Order

1. Beginning of periods. The date ~~of~~ *a* judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose. *The beginning date of all such periods is extended [90] days for all final judgments or final orders that do not state with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that the judgment or order is final as to all claims between all parties and is appealable.*

2. Date to be shown. Judges, attorneys and clerks are directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

3. Notice of judgment. When the final judgment, *final order,* or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. *The notice of final judgment or final order must state that the court has disposed of all claims between all parties and that the judgment or order is final and appealable.* Failure to comply with the *notice*

provisions of this ~~rule~~ *paragraph* shall not affect the periods mentioned in paragraph (1) ~~of this rule~~, except as provided in paragraph (4).

4. No notice of judgment. If within twenty days after the ~~judgment or other appealable order is signed,~~ *beginning date for all periods, as determined under paragraph (1),* a party adversely affected by the judgment or order or his attorney has ~~neither~~ *not* received the notice required by paragraph (3) ~~of this rule~~ nor acquired actual knowledge of the *signed* order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the ~~signing~~ *signed order*, whichever occurred first, but in no event shall such periods begin more than ninety days after the ~~original judgment or other appealable order~~ *beginning date as determined under paragraph (1)* .

5. Motion, notice and hearing. In order to establish the application of paragraph (4) ~~of this rule~~, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received ~~a~~ *the* notice ~~of the judgment~~ *required by paragraph (4)* or acquired actual knowledge of the ~~signing~~ *signed judgment or order* and that this date was more than twenty days after the ~~judgment was signed.~~ *beginning date as determined under paragraph (1).*

6. Nunc pro tunc order. When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) ~~of this rule~~ shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.

7. When process served by publication. With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has

been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

M E M O R A N D U M

TO: All members of the Supreme Court Advisory Committee

FROM: David Peeples

RE: Finality of Judgments

DATE: June 14, 2001

At our meeting on March 30, I was asked to write up my suggestions for improving the existing finality rules without a comprehensive rewrite. Here they are.

1. General observations. First some general thoughts.

A. Finality is not a problem in the trial courts. Now that *Lehmann* has clarified and improved the law, it is okay with me to leave things alone.

B. Even if we decide to leave present law as it is, the supreme court has asked us to draft a rule of some kind. My new rule 306 (attached) is offered in that spirit. I think we should do something like this because it would put the case law in one concise rule with one minor improvement (requiring the language to be near the judge's signature).

C. There are of course occasional appellate problems, but most of our efforts to solve those problems with new rules (e.g., mandatory language or mandatory death certificate) threaten to create fresh problems in the trial courts (i.e. many judgments remaining interlocutory and pending indefinitely). Put to the choice, I would prefer the status quo to the mandatory-language solutions we have been discussing so far.

D. In the event we decide to go beyond merely restating present law in a concise rule, my revised rule 306a (attached) tries to reduce the inadvertent loss of appeal rights by negligent attorneys—by requiring a more thorough notice of judgment and giving additional time for correction of mistakes.

2. Existing law. I submit that the following principles can be distilled from the cases:

A. Complete relief. When the court has granted or denied all relief sought as to all parties (whether in one instrument or in two or more instruments taken together), there is a final judgment, and all trial-court and appellate timetables begin to run from the date the last order was signed.

B. *Severance.* By carving one case into two, a severance can make an existing interlocutory order become final. The severance does this by factoring out the unadjudicated claims and/or parties from the others. After the severance, if one case contains only adjudicated claims, the severance has created a final judgment in that case.

C. *Language.* Under the supreme court's recent decision in *Lehmann,* traditional Mother Hubbard catch-all language is no longer effective to adjudicate claims and thereby create finality. Under *Lehmann*, general language can have Mother Hubbard effect only if it shows with unmistakable clarity that all claims by and against all parties have been adjudicated.

3. Problems with existing law. The committee's discussions have identified three principal problems under the present rules. There may be others, but these are the main ones. (*Lehmann* has ameliorated Problem *A* below, but not entirely.)

A. *Inadvertent loss of appeal rights by catch-all clause.* This problem seems to occur primarily in summary judgments, but it can happen in other situations too. After a hearing on a motion for partial summary judgment, the court *should* sign an order dealing specifically with the issues presented and nothing else. But until *Lehmann* a Mother Hubbard clause in the order has had the effect of denying all other claims, including claims as to parties that the motion did not even mention. *See Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). As a result, the trial-court and appellate timetables would start to run, and they sometimes expired before unwary litigants and lawyers realized that the catch-all clause had denied their claims. *Lehmann*'s requirement of neon language will help put everyone on notice that a final judgment has been signed, but I am sure there will still be negligent and inattentive lawyers who do not notice or do not understand.

B. *Inadvertent loss of appeal rights by cumulative orders.* When the rulings in successive orders add up to a complete adjudication of all claims between all parties, the result is a final judgment, even if the last order does not mention the earlier ones or contain language of finality. Some lawyers do not realize that the timetables begin to run when the last order is signed, and they have a rude awakening when they learn later that the time for perfecting appeal has passed. *Lehmann* does not address this problem.

C. *Finality hard to determine.* After a series of interlocutory rulings in complicated cases, judges sometimes have difficulty determining whether there has been a complete adjudication. District and County Clerks, who must send notice of final judgment under Rule 306a(3), have the same difficulty.

4. The attached rules vs. other proposals.

A. Other proposals. It has been suggested that we *require* neon language in the judgment, or perhaps require a death certificate signed by the judge. My main objection to these suggestions is that they focus only on the appellate issues (inadvertent loss of appeal rights) at the expense of trial-court finality concerns. Both the appellate and trial-court issues are important. But if the language (or the death certificate) is *mandated*, judgments without the language (or the death certificate) will remain interlocutory until someone learns about it and gets the language included (or the death certificate signed). I consider it unacceptable to have so many cases remain interlocutory and pending indefinitely.

B. The attached proposals. If we decide to do more than restate existing law in proposed rule 306, I propose the modified rule 306a. Amended rule 306a would do these things:

(1) Clarify present law of finality. Judgments become final in the following three ways (or some combination of them):

- By presumption after a conventional trial on the merits,

- By expressly disposing of all parties and issues (including series of orders),

or

- By including *Lehmann*-type neon language.

(2) Put final/appealable language in prominent place. Lawyers who want the judgment to become final quickly would be motivated to include the *Lehmann* language because if such language is not used the timetables would be delayed automatically for 90 days. In other words, when the language is not used all time-tables are extended, even if the judgment expressly disposes of all issues between all parties. Judges would usually insist on the language when they intended finality and would certainly strike it out when they did not.

(3) Require more meaningful notice from the clerk. The clerk's notice would have to say the court has signed a judgment that disposes of all issues between all parties and is final and appealable.

(4) Extend timetables. If anyone can prove that this notice was not received, the timetables will be extended for potentially 90 more days. Thus, if the judgment lacks the required language *and* the beefed-up notice is not given, the timetables would be extended for two consecutive 90-day periods, for a total of 180 days.