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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

March 9, 2002

(SATURDAY SESSION)

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**COPY**

Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
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day of March, 2002, between the hours of 9:22 a.m. and  
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**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: All right. We're on the record, right, Nina? Hey, Nina, are we on the record?

Justice Hecht is going to be a little bit late. He's at a funeral, unfortunately. Not his own. That's the good news. So --

MR. EDWARDS: I thought that unfortunately came awful close. You want to take that off the record?

CHAIRMAN BABCOCK: It's not his own funeral. He's attending someone else's funeral. That's the unfortunate thing. And Orsinger is -- how could we put it? Missing in action?

MS. SWEENEY: Again? What do you-all keep doing to that poor boy?

HONORABLE JAN PATTERSON: It's the usual Saturday morning.

PROFESSOR CARLSON: He can't play with the big boys.

CHAIRMAN BABCOCK: Yeah. He used to be able to play with the big boys, but not anymore. So we will skip down to Item 2.10 on the agenda, which is 306a(e)(5)(c) and (e)(5)(d), the scintillating topic that Sarah Duncan is going to talk to us about.

HONORABLE JAN PATTERSON: That's a tough way to start.

1 CHAIRMAN BABCOCK: Huh?

2 HONORABLE JAN PATTERSON: That's a tough way  
3 to start.

4 CHAIRMAN BABCOCK: It's an eye-opener.

5 HONORABLE SARAH DUNCAN: It's not. It's not  
6 today.

7 HONORABLE JAN PATTERSON: Okay. Good.

8 HONORABLE SARAH DUNCAN: Today we're done  
9 with the hard stuff. The 306a that is dated January 23rd,  
10 2002, the only changes are the very minor textural changes  
11 we discussed not at the last meeting, because I wasn't  
12 here, but at the meeting before.

13 The only substantive aspect on 306a that's  
14 left to discuss is the page that has Option 1, mandatory  
15 hearing, and Option 2, hearing at the option of the trial  
16 court. The Option 2 is the best I could do, and I don't  
17 think it's very good based on the suggestion that was  
18 made, I believe by Judge Peeples, to incorporate something  
19 like the venue hearing. And, you know, I went and looked  
20 at the case that was mentioned, and I did not -- I just  
21 didn't see that it advanced the ball, but I've done my  
22 best to incorporate it into Option 2.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE SARAH DUNCAN: So really the only  
25 decision we need to make is whether there's going to be a

1 mandatory hearing or whether the hearing is optional.

2 CHAIRMAN BABCOCK: Judge Peeples, what do  
3 you think?

4 HONORABLE DAVID PEEPLES: I'm just now  
5 reading this, Chip. I'm sure I've seen it before, but I  
6 was kind of caught off guard when you called this.

7 CHAIRMAN BABCOCK: Why don't we take a  
8 minute to read it and then we can comment on it?

9 MR. HAMILTON: Where are we supposed to be  
10 having it?

11 MS. SWEENEY: Where is this Option 2?

12 MR. HATCHELL: It's below Option 1.

13 HONORABLE SARAH DUNCAN: Yes. It's below  
14 Option 1, as Mike says.

15 MS. SWEENEY: Thank you, Mike.

16 HONORABLE SARAH DUNCAN: Everything is  
17 really helpful this morning, right?

18 MS. SWEENEY: Yeah. I am not a morning  
19 person. You're going to have to be more helpful than  
20 that.

21 HONORABLE SARAH DUNCAN: What I have that I  
22 copied that I got off the website rather than use my own  
23 copy has -- there were basically three documents. One was  
24 Rule 306a, one is TRAP 4.2, and then the third document is  
25 the hearing options.

1 MS. SWEENEY: Sarah, can I ask you a  
2 question?

3 HONORABLE SARAH DUNCAN: No.

4 MS. SWEENEY: Okay. That's all right.

5 HONORABLE SARAH DUNCAN: Of course.

6 MS. SWEENEY: Both of these have the same  
7 language about what the court shall determine its ruling  
8 based on.

9 HONORABLE SARAH DUNCAN: Uh-huh.

10 MS. SWEENEY: Why this list? I mean, isn't  
11 that sort of what the court always bases a ruling on? Are  
12 we trying to exclude something by not listing it? What's  
13 the --

14 MR. LOW: Are you excluding oral testimony?  
15 I mean, I guess that was --

16 HONORABLE SARAH DUNCAN: There's not an  
17 intent to exclude anything. I think the rule as now  
18 written doesn't have anything in it, and we discussed at  
19 the meeting before last that we didn't think this hearing  
20 really should be any different from any other hearing. If  
21 you want to add to the list, if you want to take the list  
22 out, it's not --

23 MS. SWEENEY: I just -- I mean, most motion  
24 practice there's not, you know, a list of what the court  
25 is to consider, and I mean, this would be essentially the

1 list, but I just wonder if we're creating a --

2 HONORABLE SARAH DUNCAN: I think in most of  
3 the places in the rules that talk about a hearing on a  
4 specific kind of motion, I think there is a list.

5 MS. SWEENEY: Is there?

6 HONORABLE SARAH DUNCAN: I may be mistaken,  
7 but I think --

8 CHAIRMAN BABCOCK: There are a lot of  
9 places.

10 PROFESSOR CARLSON: 120a,

11 HONORABLE SARAH DUNCAN: 120a, venue.

12 PROFESSOR CARLSON: 88, 257.

13 CHAIRMAN BABCOCK: What we're discussing  
14 this morning is 306a(5)(c), right? That's the hearing  
15 aspect? That's what we're discussing, right?

16 HONORABLE SARAH DUNCAN: Uh-huh. Yes.

17 MS. SWEENEY: And those two sentences are in  
18 the attachment?

19 CHAIRMAN BABCOCK: Right.

20 MS. SWEENEY: I don't oppose them. I'm just  
21 curious.

22 CHAIRMAN BABCOCK: Well, the question is  
23 mandatory hearing or not. That's the basic issue. We can  
24 tinker with the language if we want, but --

25 HONORABLE DAVID PEEPLES: Have there been

1 some problems as to whether a hearing is required or not  
2 or discretionary? I mean, why can't we leave it basically  
3 the way it's been for the last however many years? Is the  
4 issue here whether the judge can do it on submission or  
5 whether an oral hearing is required?

6 HONORABLE SARAH DUNCAN: Yes. That is the  
7 issue. And my understanding, and it may be incorrect, is  
8 that most people in the past have had oral hearings on  
9 these things. There was some sentiment in the  
10 subcommittee, and I believe some sentiment on the full  
11 committee, if the responding party doesn't make an effort  
12 to controvert the allegations in the affidavit supporting  
13 the motion, why should there be a hearing?

14 My own view was and is -- but maybe I'm the  
15 only one that thinks a 306a procedure is a really big  
16 deal, to me, and I think there ought to be a hearing. I  
17 think the trial court ought to have to look the witnesses  
18 in the eye and try to figure out who's telling the truth  
19 and get down to the bottom line.

20 CHAIRMAN BABCOCK: Judge Brown, what's the  
21 practice in Harris County? Is that done -- are these  
22 hearings done on submission or are they always set for  
23 oral argument?

24 HONORABLE HARVEY BROWN: Each judge does it  
25 differently.



1 CHAIRMAN BABCOCK: Yeah. But there are some  
2 judges in Harris County that do it on submission, right?

3 HONORABLE HARVEY BROWN: Yes. Yeah, I mean,  
4 just because it's important doesn't necessarily mean you  
5 have to have a hearing. Summary judgment's -- a lot of  
6 judges do not have hearings.

7 HONORABLE SARAH DUNCAN: But a summary  
8 judgment is determined on the basis of a written record,  
9 whereas, the primary issue, it seems to me, in a 306a  
10 proceeding is credibility.

11 HONORABLE HARVEY BROWN: Yeah.

12 HONORABLE DAVID PEEPLES: If someone wants  
13 to present oral testimony, how can you deny that person a  
14 hearing?

15 PROFESSOR CARLSON: Yeah.

16 HONORABLE HARVEY BROWN: To me that's the  
17 real question. If they are only going to do it on the  
18 papers then I think it should be discretionary with the  
19 court; but if you want oral testimony, you make a request  
20 for a hearing to present oral testimony and you have to  
21 have a hearing. There's no other way to present it.

22 CHAIRMAN BABCOCK: What about in Option 2 if  
23 you said "if the trial court determines that an oral  
24 hearing would be useful or if testimony is to be received,  
25 the court must"?

1 MR. EDWARDS: You need some time limit on  
2 the request for a hearing for oral testimony, it looks  
3 like to me.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. EDWARDS: You may be talking about a  
6 combination of two --

7 CHAIRMAN BABCOCK: Right. Right.

8 MR. EDWARDS: -- alternatives.

9 HONORABLE HARVEY BROWN: "If the party  
10 states an intention to present oral evidence."

11 HONORABLE DAVID PEEPLES: I guess I'll ask  
12 again. Is there some problem out there that we're trying  
13 to fix by telling people, you know, it's either mandatory  
14 or discretionary to have a hearing, because the rule as it  
15 is right now doesn't deal with this, and if there's no  
16 problem, why are we doing this?

17 CHAIRMAN BABCOCK: I don't know if there's a  
18 problem or not, but I think that generally speaking that  
19 if you want to present something at a oral hearing in some  
20 courts in Harris County it's very difficult to do so,  
21 because there are some judges that just do everything on  
22 submission.

23 HONORABLE SARAH DUNCAN: Even if you don't  
24 want to present oral testimony, let's say that the motion  
25 is filed and the affidavits are filed supporting it and

1 your problem with them as the responding party is that  
2 they don't really get to the date the rule says you have  
3 to get to.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE SARAH DUNCAN: They walk all  
6 around it, as a lot of these motions do, and they'll talk  
7 about when the party first received notice and they'll  
8 talk about when the party's attorney saw a copy of the  
9 judgment, but they don't ever really get to when was the  
10 first point of notice. I think you can do that with the  
11 trial judges, what I've seen with most of them, more  
12 effectively in an oral hearing. So even if I didn't want  
13 to present oral testimony, I would want a hearing to point  
14 that out to the trial judge.

15 CHAIRMAN BABCOCK: What do you think about  
16 that, Judge Brown?

17 HONORABLE HARVEY BROWN: I mean, I agree  
18 with that, but on the flip side of that the sense is I  
19 think the court of appeals should give that person a  
20 hearing, too, but they don't always give oral argument. I  
21 mean, I think oral argument should be, frankly, permitted  
22 for anybody who wants it, but that isn't the way we've run  
23 our courts in this state. We've let the judges have  
24 discretion.

25 MR. EDWARDS: I think that the giving of

1 oral testimony is the most important part of that. Any of  
2 these things I've ever been involved in there's a  
3 straight-up swearing match --

4 CHAIRMAN BABCOCK: Yeah.

5 MR. EDWARDS: -- and you want to talk to the  
6 people -- if you're trying to hold something or defeat  
7 something, you're going to want to talk to the people who  
8 say that they signed a notice, they sent the notice. You  
9 know, sometimes you see that somebody will set back a  
10 mailing machine and show up with a letter that's been --  
11 that says it was sent on a particular date when in truth  
12 and in fact it wasn't. Those are things I've actually  
13 seen happen.

14 CHAIRMAN BABCOCK: Yeah. Is anybody aware  
15 of a hearing being denied under those circumstances? I  
16 mean, I don't see how it could be. The question is  
17 whether or not we want to make this a requirement.  
18 Anybody feel strongly about it one way or the other?

19 Okay. The default goes to the chair then.

20 HONORABLE SARAH DUNCAN: Well, I think I do.

21 HONORABLE DAVID PEEPLES: Let's make it  
22 mandatory.

23 HONORABLE SARAH DUNCAN: I do feel strongly  
24 that for something as serious as changing the date of the  
25 judgment there should have to be a hearing.

1 CHAIRMAN BABCOCK: Okay. So if there's no  
2 further discussion, why don't we vote on that?

3 MR. ORSINGER: Chip, I'll make a comment. I  
4 tried one of these in Laredo one time, and there was a  
5 very big fact dispute as to whether the lawyer received  
6 notice or not, and I had the subpoena and two of the court  
7 clerks to come in and testify to the contrary to what the  
8 lawyer testified to and everything. If I had not had the  
9 opportunity -- or what would you do if the lawyer's  
10 affidavit says one thing and then you've got two clerks  
11 that have affidavits saying, "No, I told the lawyer that  
12 the judgment was entered"? Then the trial court would  
13 have to have a hearing, wouldn't they?

14 CHAIRMAN BABCOCK: You would think so.

15 MR. ORSINGER: Or are the affidavits  
16 irrebuttable?

17 MR. EDWARDS: They wouldn't have to have a  
18 hearing, but if that happens, like Sarah's saying, it's  
19 the credibility that's an issue, and you're letting the  
20 trial court address the issue of credibility on the basis  
21 of affidavits as opposed to cross-examination, which is a  
22 very difficult thing for the court and really not fair to  
23 the parties.

24 CHAIRMAN BABCOCK: Right.

25 MR. EDWARDS: And I would presume if you

1 wanted to put on evidence and a court wouldn't let you do  
2 it, you do it by bill of exceptions or offer of proof and  
3 then the court of appeals would have to deal with it and  
4 perhaps send the case back to the trial court for the  
5 taking of testimony.

6 HONORABLE DAVID PEEPLES: I think we ought  
7 to go with Option 1, which is mandatory. These are very  
8 rare in my experience, important when they happen, but  
9 they -- I just don't think we're opening ourselves up for  
10 a whole lot of time and a whole lot of extra hearings. I  
11 think we ought to make it mandatory and move on.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE DAVID PEEPLES: If somebody asks  
14 for it.

15 CHAIRMAN BABCOCK: All right. Anybody  
16 disagree with that? Do we have consensus or should we  
17 take a vote? I don't see -- you want to vote? Okay.

18 PROFESSOR CARLSON: I have one question.  
19 Sarah, if no one -- if the movant doesn't ask for a  
20 hearing under Option 1 then what happens? Do they waive  
21 their right?

22 MR. EDWARDS: I would say that you don't  
23 have to ask for a hearing. I guess you would say "any  
24 party may ask for a hearing," and I don't think it should  
25 just be at the insistence of the movant because the

1 respondent may be the one with the real desire to have  
2 witnesses.

3 HONORABLE HARVEY BROWN: Uh-huh.

4 MR. EDWARDS: As Richard just pointed out,  
5 he was the respondent, I understand, in that motion.

6 PROFESSOR CARLSON: So should Option 1 be  
7 "within 10 days of the filing of motion, any party may  
8 request a hearing and the court must hear it as soon as  
9 practicable"?

10 HONORABLE DAVID PEEPLES: I kind of like  
11 that.

12 MR. EDWARDS: And "if requested, the court  
13 must hear it."

14 CHAIRMAN BABCOCK: Okay. Say that again,  
15 Elaine.

16 PROFESSOR CARLSON: I don't know. No,  
17 "Within 10 days of the filing of the motion, any party may  
18 request a hearing on its motion."

19 MR. EDWARDS: "On the motion."

20 PROFESSOR CARLSON: "On the motion," yes.

21 MS. SWEENEY: "Within 10 days," what does  
22 that mean? That you have to wait 10 days to ask, that you  
23 can only ask during the 10 days?

24 CHAIRMAN BABCOCK: Within 10 days. So the  
25 motion is filed and then you've got 10 days for -- anybody

1 can ask for a -- but what if there's not service for  
2 awhile?

3 PROFESSOR CARLSON: Yeah. And what if you  
4 want to ask for your hearing at the time you file your  
5 motion?

6 MS. SWEENEY: Well, why do we have "within  
7 10 days"? Why don't we just say "any party can ask for a  
8 hearing"?

9 HONORABLE SARAH DUNCAN: If you'll remember,  
10 in 306a(5)(b) we ultimately decided -- I know. They just  
11 come right off the top of the tongue.

12 PROFESSOR CARLSON: You remember.

13 HONORABLE SARAH DUNCAN: We ultimately  
14 decided to let people file 306a motions at any time, and  
15 once we decide that you can file a 306a motion at any  
16 time, it seems to me and to the subcommittee that we've  
17 got to have something in the rule to cause this proceeding  
18 to get over with.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE SARAH DUNCAN: And so it's not so  
21 much that the 10 days needs to be 10 as opposed to 8 as  
22 opposed to 14, but I think there needs to be some time  
23 limit for having the hearing so that we can get to the  
24 point that we know what the date of judgment is.

25 CHAIRMAN BABCOCK: Is 10 the right time



1 period? Well, if I'm responding, if I'm the nonmovant,  
2 and the motion is filed and they mail it to me and it  
3 takes three days to get there and maybe I'm out of town or  
4 something, it doesn't give me very much time to ask for a  
5 hearing.

6 PROFESSOR CARLSON: Wouldn't 21a give you  
7 three more days?

8 CHAIRMAN BABCOCK: Would it? It probably  
9 would. Probably would. So that's okay.

10 All right. We probably ought to change  
11 "its" to "the." "Within 10 days of the filing of the  
12 motion any party may request a hearing on the motion, and  
13 the court must hear the motion as soon as practicable."

14 HONORABLE HARVEY BROWN: Can I ask a  
15 question?

16 CHAIRMAN BABCOCK: Yeah, Judge Brown.

17 HONORABLE HARVEY BROWN: It says the  
18 affidavits have to be served seven days before the  
19 hearing. What if you get the motion and you only get 10  
20 days notice of the hearing? Seven days might mean you  
21 only have two or three days to put together affidavits on  
22 response. I mean, I think that's probably fair for the  
23 movant, but for the respondent, they might need a little  
24 more time.

25 PROFESSOR CARLSON: Yeah. Is discovery ever

1 conducted on this, take deposition after you get the  
2 affidavit if you don't believe the person? Maybe our 10  
3 days isn't right.

4 CHAIRMAN BABCOCK: Should we make it 20?

5 HONORABLE HARVEY BROWN: Of course, this is  
6 just request. This doesn't say "must conduct the hearing  
7 within 10 days."

8 CHAIRMAN BABCOCK: Well, that's right.

9 HONORABLE SARAH DUNCAN: Right.

10 CHAIRMAN BABCOCK: Carl, did you have a  
11 comment?

12 MR. HAMILTON: "Within," I think to be  
13 consistent with the rest of the rules say "not later  
14 than." Like the legislative mandate on wording.

15 HONORABLE SARAH DUNCAN: "Not later than"?

16 CHAIRMAN BABCOCK: "Not later than 10 days  
17 after" -- you have to change "of" to "after," right?  
18 Okay.

19 MR. EDWARDS: Would it be after filing of  
20 the motion or after notice of the filing of motion?

21 CHAIRMAN BABCOCK: Yeah, that was the point  
22 I was raising. Yeah.

23 MR. EDWARDS: Yeah. You have the notice and  
24 the filing of motion.

25 MR. GILSTRAP: Chip?

1 CHAIRMAN BABCOCK: Yes.

2 MR. GILSTRAP: It's possible, I guess, under  
3 this rule to file -- to learn about it on the 89th day and  
4 file your motion, and if we say you have to give seven --  
5 are we saying you have to give seven days notice? I mean,  
6 I could see a situation where that will have to be  
7 shortened.

8 CHAIRMAN BABCOCK: Right. No, I don't think  
9 we're -- well, maybe we are saying seven days notice.

10 HONORABLE SARAH DUNCAN: I'm sorry. I don't  
11 understand what you're saying.

12 MR. GILSTRAP: You've got up to 90 days  
13 after date of judgment to file your motion.

14 HONORABLE SARAH DUNCAN: No. You can file  
15 your motion at any time.

16 MR. GILSTRAP: But you've got to up to 90  
17 days you can file your motion or have it heard. Which is  
18 it?

19 HONORABLE SARAH DUNCAN: Neither. Neither.  
20 It may be after the notice of appeal has been filed that  
21 you file the motion and have the hearing and --

22 MR. GILSTRAP: Okay.

23 HONORABLE SARAH DUNCAN: -- change the date  
24 of signing.

25 MR. GILSTRAP: Because you can file it at

1 any time. Right. You just have -- okay. It just can  
2 extend it to 90 days. I see.

3 HONORABLE SARAH DUNCAN: The 90 days only --  
4 as I understand it, only -- is only relevant to when you  
5 acquired notice.

6 MR. EDWARDS: Well, when you get to the  
7 seven days you can modify that "without leave of court" or  
8 something, so that the court can give you leave, give a  
9 party leave if it's a short fuse for some reason and good  
10 cause exists for it being short. If you just sit around  
11 and wait, you know it's happening and you sit around on  
12 your hands and wait --

13 CHAIRMAN BABCOCK: Right.

14 MR. EDWARDS: -- you know, I don't think  
15 that the rules ought to reward negligence or game playing  
16 either one.

17 CHAIRMAN BABCOCK: Yeah. So how would you  
18 suggest fixing it, Bill?

19 MR. EDWARDS: I think you say the filing of  
20 affidavits at least seven days before the hearing is okay,  
21 but you need to modify it to deal with the motion that's  
22 filed within seven days of the time the time runs out. Or  
23 you can file the motion --

24 HONORABLE SARAH DUNCAN: I'm not following.

25 MR. EDWARDS: You can file the motion at any

1 time, but the court's going to lose plenary jurisdiction  
2 after a given point in time, aren't they?

3 HONORABLE SARAH DUNCAN: No. The court's  
4 already lost -- I mean, assume with me that we're way past  
5 the trial court's plenary power. There's already been a  
6 notice of appeal filed and the court of appeals has issued  
7 a show cause order saying, "It looks to us like your  
8 appeal's not timely, and you go back into the trial court  
9 and file your 306a motion to establish a different date of  
10 judgment" --

11 MR. EDWARDS: How long do you have?

12 HONORABLE SARAH DUNCAN: -- "so that your  
13 appeal is timely."

14 MR. EDWARDS: How long do you have to have  
15 it heard and all that?

16 HONORABLE SARAH DUNCAN: There's no time  
17 limit.

18 MR. EDWARDS: No time limit? Well, then the  
19 seven days is no problem.

20 CHAIRMAN BABCOCK: Yeah. Yeah. I think  
21 that's right.

22 MR. EDWARDS: I just hope I'm never there.

23 CHAIRMAN BABCOCK: Yeah. Don't we all.

24 MR. GILSTRAP: Well, we could be talking --  
25 with a restricted appeal we could be talking a very long

1 time, six months plus 90 days.

2 CHAIRMAN BABCOCK: Okay. Here's how it  
3 reads now. "Not later than 10 days after the filing of  
4 the motion any party may request a hearing on the motion,"  
5 et cetera, et cetera. How does that strike you, Mike?

6 MR. HATCHELL: Yeah. I think that's --

7 CHAIRMAN BABCOCK: Is that all right?

8 MR. HATCHELL: Yeah. I think so.

9 HONORABLE HARVEY BROWN: Well, what about  
10 the affidavits of the responding party? I'm not clear on  
11 that.

12 CHAIRMAN BABCOCK: I think Sarah's thinking  
13 was that that was okay.

14 HONORABLE HARVEY BROWN: But what if they've  
15 only gotten the motion 10 days before the hearing and so  
16 they only have two days or a day to get affidavits?  
17 That's just not going to be enough time.

18 They file the motion. It's set for hearing  
19 in 7 days or 10 days. The responding party is supposed to  
20 have their affidavit on file seven days before the  
21 hearing. Isn't that almost going to be an impossibility  
22 in some cases? Am I missing something?

23 PROFESSOR CARLSON: How does that work with  
24 a special appearance?

25 CHAIRMAN BABCOCK: Yeah. I was just

1 wondering that.

2 PROFESSOR CARLSON: You have the same  
3 seven-day trigger.

4 HONORABLE SARAH DUNCAN: I mean, I assume  
5 that if the moving party sets its motion for a hearing in  
6 seven days so that there's not seven days for the  
7 responding party to get their affidavits together, I would  
8 assume the trial judge would grant a motion to continue  
9 the hearing.

10 CHAIRMAN BABCOCK: Or allow the affidavits  
11 to be filed in less than seven days.

12 HONORABLE SARAH DUNCAN: Yeah. But I think  
13 the trial judge can do that just under the regular rule  
14 that a trial court can -- you can always file a motion to  
15 shorten or lengthen any period of time in the rules.

16 CHAIRMAN BABCOCK: But we have mandatory  
17 language here, "The affidavit shall be served at least  
18 seven days before the hearing, unless a shorter period is  
19 allowed by the court for good cause."

20 HONORABLE SARAH DUNCAN: Isn't that implicit  
21 in every rule? I mean, that's --

22 PROFESSOR CARLSON: Well, yes and no. I  
23 mean, like for a motion to transfer venue or summary  
24 judgment where you've got paper proof, you know, the  
25 hearing can't -- you have 21 days or 45 days, and here we

1 don't set a time. In fact, we tell the court to hear it  
2 as soon as practicable.

3 CHAIRMAN BABCOCK: How about if we add this  
4 phrase? "The affidavits, if any, shall be served at least  
5 seven days before the hearing, unless a shorter period is  
6 allowed by the court for good cause"? Does that solve the  
7 problem?

8 HONORABLE HARVEY BROWN: Yeah. I think it  
9 does.

10 CHAIRMAN BABCOCK: Is that okay, Linda?  
11 Yeah, Carl.

12 MR. HAMILTON: If within the 10 days nobody  
13 requests a hearing, is that automatically waived at that  
14 time?

15 HONORABLE SARAH DUNCAN: You and I were  
16 thinking the same thing, because of the way that we've  
17 changed the first clause --

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE SARAH DUNCAN: -- this could be  
20 completely open-ended, and the reason the subcommittee  
21 wrote it to make the moving party request a hearing is --  
22 within a particular period of time is that the movant is  
23 the one who wants to change a -- the status quo, which may  
24 very well be a judgment that's final for purposes of  
25 appeal, unless something is done in this proceeding; and I



1 don't think it's unfair that if somebody wants to do that,  
2 they should bear the burden of requesting a hearing within  
3 a particular period of time.

4           And, you know, the reason we put the burden  
5 on the movant to request the hearing instead of saying  
6 you've got to have a hearing within this many days, is we  
7 can't -- neither the movant nor we, I don't think, can  
8 force trial judges to hear things within X number of days  
9 of anything. The movant is in a terrible position if the  
10 trial judge is disinclined to do the movant, you know, any  
11 big favors. They may not get a hearing within the  
12 specified period of time no matter how many requests they  
13 make.

14           CHAIRMAN BABCOCK: But what happens if the  
15 movant does not make a request for a hearing within -- or  
16 not later than 10 days after the filing of its motion? Is  
17 it not decided or is it denied?

18           HONORABLE SARAH DUNCAN: Well, that depends  
19 on what we decide. The way it's written, the way the  
20 subcommittee wrote it, was that the movant has the burden  
21 to request the hearing within 10 days; and if they don't,  
22 there's no decision on that motion and the date of  
23 judgment is not going to change.

24           CHAIRMAN BABCOCK: Okay. Jan.

25           HONORABLE JAN PATTERSON: Judge Duncan, what

1 did the committee have in mind with the results of  
2 discovery processes? That seems to me to be pretty  
3 open-ended.

4 HONORABLE SARAH DUNCAN: It was just lifted  
5 from, I think, 120a. I don't think the committee had  
6 anything in particular in mind.

7 CHAIRMAN BABCOCK: And I could see how the  
8 situation could exist where the motion gets filed, the  
9 movant, for whatever reason, doesn't ask for a hearing, so  
10 the motion is just kind of in limbo, but the nonmovant  
11 wants to get it disposed of, wants to get this little  
12 loose end tied up, this --

13 HONORABLE SARAH DUNCAN: I don't see why the  
14 nonmovant cares one way or the other.

15 MR. GILSTRAP: He wants the clock to run.

16 HONORABLE SARAH DUNCAN: Right.

17 HONORABLE HARVEY BROWN: Then it would be  
18 waived.

19 HONORABLE SARAH DUNCAN: The nonmovant, as  
20 far as I can understand this 306a scenario, has been  
21 operating with the date the judgment was, in fact, signed  
22 as the date of judgment, and they're cool with that. They  
23 don't want it changed.

24 CHAIRMAN BABCOCK: Okay. Yeah, Richard.

25 MR. ORSINGER: I'm not sure that the time is

1 that big a deal. If there is no hearing, the judgment  
2 stands.

3 CHAIRMAN BABCOCK: Right.

4 MR. ORSINGER: And the court of appeals is  
5 going to dismiss it by a certain date if something isn't  
6 done to show that there's jurisdiction.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. ORSINGER: So there's no harm in letting  
9 it float, and eventually the court of appeals is going to  
10 rule.

11 MR. EDWARDS: What is the timetable on the  
12 court of appeals under those circumstances? How long does  
13 it float? Because if you're sitting there with a  
14 judgment, you want some finality, and you don't want it  
15 sitting out there in the never-never world where you can't  
16 do anything.

17 MR. ORSINGER: It varies from court of  
18 appeals to court of appeals, but typically no later than  
19 oral submission somebody is going to look at it to see if  
20 there's jurisdiction. Would you agree with that, that by  
21 the date of submission somebody will have looked at it to  
22 see if there's jurisdiction?

23 HONORABLE SARAH DUNCAN: It depends on the  
24 court.

25 MR. EDWARDS: Yeah.

1 MR. ORSINGER: Well, I mean --

2 HONORABLE SARAH DUNCAN: Our court will do  
3 it as soon as we get the clerk's record. We will conduct  
4 a jurisdiction check.

5 MR. ORSINGER: Yeah. See, some of them do  
6 it right away, but I would think the outside is the date  
7 of submission. By that time somebody will have pulled the  
8 file and tried to familiarize themselves with the issues  
9 in the case for purposes of submission.

10 CHAIRMAN BABCOCK: And the harm of allowing  
11 any party to request a hearing is what, Sarah? You and  
12 Carl hit upon it, but I didn't understand it.

13 MR. HAMILTON: It's waived if nobody asked  
14 for it. But I don't know how it works in a lot of trial  
15 courts, but in our trial courts you file a motion, the  
16 judge never looks at it, never sees it unless you also  
17 file an order setting it for hearing. I don't care  
18 whether it's for submission or hearing or what, so  
19 somebody has got to do something to bring it to the  
20 attention of the trial judge or it will never get there,  
21 and there will never be a ruling on it.

22 CHAIRMAN BABCOCK: Uh-huh.

23 MR. HAMILTON: So somebody has got to do  
24 something.

25 HONORABLE SARAH DUNCAN: Uh-huh.

1                   CHAIRMAN BABCOCK: Is there harm in allowing  
2 a nonmovant for, you know, as Bill says, you know, maybe  
3 just wants to have a hearing, is there any harm in  
4 requiring the nonmovant to --

5                   MR. ORSINGER: Permitting the nonmovant.

6                   CHAIRMAN BABCOCK: Permitting the nonmovant.

7                   MR. ORSINGER: No harm in that.

8                   CHAIRMAN BABCOCK: Doesn't seem like to me  
9 there is, is there, Sarah? Mike.

10                  MR. HATCHELL: Well, it seems to me that  
11 people are reading this -- and I think it is susceptible  
12 to being read this way -- that if the movant doesn't  
13 request a hearing, the motion is overruled. I would say  
14 you could read that another way, is that if the movant  
15 doesn't request a hearing, he doesn't get a hearing, but  
16 it doesn't prevent the trial judge from ruling on the  
17 basis of the affidavit. So I think there's a case called  
18 Strikebean vs. Pruitt --

19                  CHAIRMAN BABCOCK: So now you're showing off  
20 again.

21                  MR. HATCHELL: Something to that effect, and  
22 so then you're back in Richard's situation where maybe the  
23 nonmovant wants a hearing. So all I'm saying is it ought  
24 to be clear as to what happens if the movant doesn't  
25 request a hearing. Is it overruled as a matter of law, or

1 does the trial court have the power nevertheless to rule?

2 CHAIRMAN BABCOCK: Which way should it be?

3 I read it the way that if there's no hearing requested  
4 then the court will just rule on it in due course, but  
5 what Carl says is in his area --

6 MR. ORSINGER: Yeah, but that's a universal  
7 practice that judges don't look at motions unless someone  
8 calls them to their attention.

9 CHAIRMAN BABCOCK: Well, that's not the  
10 universal practice everywhere.

11 MR. ORSINGER: In state? In the state court  
12 in Texas?

13 CHAIRMAN BABCOCK: Right. Harris County  
14 some judges will --

15 MR. ORSINGER: They look at every motion  
16 that's filed, even if it's not --

17 CHAIRMAN BABCOCK: Well, they may not, but  
18 their clerk does.

19 MR. ORSINGER: So what if the clerk looks at  
20 it?

21 CHAIRMAN BABCOCK: Well, they'll say,  
22 "You've got to rule on this by such-and-such day."

23 MR. ORSINGER: I'm appearing in the wrong  
24 courts.

25 MR. EDWARDS: In the probate courts in

1 Harris County, in the probate courts of Harris County,  
2 which try a lot of litigation because of the exclusive  
3 jurisdiction in those courts, those judges have briefing  
4 attorneys, right? The trial courts have briefing  
5 attorneys, and those briefing attorneys do look at these  
6 things, and my guess is if one of these things is filed in  
7 one of those courts under this rule the way it's written,  
8 that if no one requests a hearing they're going to rule  
9 because it says, "The court shall determine the motion on  
10 the basis of the motion," et cetera. And they could just,  
11 I guess, just determine it, in those courts at least, and  
12 they will be looked at.

13 CHAIRMAN BABCOCK: Judge Brown.

14 HONORABLE HARVEY BROWN: I don't think  
15 judges anywhere look at a motion just because it's filed  
16 except for your first month when you're reading everything  
17 and it's just so fun, because so many of them pass, and so  
18 what you wait for is a response and for it to be set on  
19 submission.

20 CHAIRMAN BABCOCK: Yeah. That's true.

21 HONORABLE HARVEY BROWN: Or somebody to ask  
22 for a hearing or for it to be set for a hearing, but to  
23 read every motion that's ever filed, even the courts with  
24 staff, they want to make sure that it's still a ripe  
25 controversy before they put time in it.

1 MR. EDWARDS: I don't know how those  
2 briefing attorneys work, but my experience in the probate  
3 courts is those things move fast, you're on a fast docket,  
4 they have all kinds of things in the probate part of it,  
5 just ordinary probate and the other things and those --  
6 you know, you go in those courts, you've got to get a  
7 local counsel to the probate courts just to make sure you  
8 don't get it in the head going through.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: What happens, you say -- we say  
11 what happens if you request a hearing, but then what  
12 happens if the judge says, "Well, I'm in trial, and I'll  
13 get around to this" --

14 MS. SWEENEY: Yeah.

15 MR. LOW: -- and it just kind of drops, and  
16 you requested a hearing but never get one. I mean --

17 HONORABLE SARAH DUNCAN: Well, and that's  
18 part of the problem we envisioned, and I think maybe  
19 one -- I don't think -- hardly anybody on my subcommittee  
20 is here. I think maybe one of the subcommittee members  
21 had actually had the experience or at least heard of the  
22 experience of exactly what you are talking about, that the  
23 movant was doing everything they could do to get their  
24 motion heard, but the trial judge just wouldn't hear it,  
25 and in that situation we don't want to penalize the movant



1 for not getting it heard because the trial court isn't  
2 cooperating.

3           But in response to what Chip was saying  
4 earlier, and certainly there's no harm, and I don't think  
5 anything in the way we wrote Option 1 initially prevented  
6 a nonmovant, a responding party, from requesting a  
7 hearing, but remember what this whole procedure is about.  
8 Somebody is trying to change the date of the judgment.  
9 Right? This isn't generally something that the responding  
10 party wants to happen, so I think the question -- and I  
11 think Mike raises a good point. The question is what  
12 burden should we put on the party who's trying to change  
13 the date of the judgment and under what penalties? What  
14 penalties are there if they don't meet that burden?

15           MR. LOW: Well, would you go to a system  
16 like we do findings of fact, conclusions of law, where you  
17 make a second one and if you don't then -- but, you know,  
18 if the judge -- but I don't know what you'd do about it.

19           HONORABLE SARAH DUNCAN: I think in the  
20 situation that you were talking about, if it were me, if I  
21 really could not get a trial judge to set a hearing on my  
22 306a motion I'd mandamus the trial judge.

23           MR. LOW: I don't mean the trial judge just  
24 refused, but I'm talking about a situation where he's busy  
25 and the clerk kind of forgets it, you know, and it just

1 falls through the hoop. Does the movant then have a duty  
2 to make a second motion for hearing or to call? I would  
3 think he would, that the movant ought to calendar it and  
4 see that it's done.

5 HONORABLE SARAH DUNCAN: The movant has to  
6 get a new date of judgment, and the only way they're going  
7 to get a new date of judgment is to have a hearing.

8 MR. LOW: Right.

9 HONORABLE SARAH DUNCAN: So I assume the  
10 movant will do whatever the movant needs to do, whether  
11 that's a second request, a phone call, a mandamus --

12 MR. LOW: Right.

13 HONORABLE SARAH DUNCAN: -- a call to the  
14 presiding judge of the region, whatever it is, the movant  
15 is going to have to do that.

16 MR. LOW: And we don't have to tell him how  
17 to practice law, I mean, in the rules.

18 HONORABLE SARAH DUNCAN: Well, if we do,  
19 somebody else is going to have to write it.

20 MR. LOW: No, no. I agree with that.

21 CHAIRMAN BABCOCK: What if you add a  
22 sentence that says -- that takes care of the problem that  
23 Mike raised and the next sentence just says, "If you don't  
24 ask for a hearing" --

25 HONORABLE SARAH DUNCAN: It's over.

1 CHAIRMAN BABCOCK: -- "then it's overruled by  
2 operation of law"?

3 MR. GILSTRAP: But when?

4 HONORABLE SARAH DUNCAN: If you don't  
5 request the hearing in 10 days of filing the motion, on  
6 the 11th day --

7 MR. GILSTRAP: On the 11th day it's  
8 overruled by operation of law.

9 MR. ORSINGER: That only solves part of your  
10 problem because then you're going to have the trial judges  
11 that won't have the hearing even though it's been  
12 requested and then it's still floating.

13 CHAIRMAN BABCOCK: Well, but that's okay.

14 MR. EDWARDS: Court of appeals will take  
15 care of that.

16 CHAIRMAN BABCOCK: Huh?

17 MR. EDWARDS: Court of appeals will take  
18 care of it.

19 CHAIRMAN BABCOCK: Yeah. Right.

20 MR. GILSTRAP: But you're creating -- I  
21 mean, just by failing to request a hearing, it's over.

22 CHAIRMAN BABCOCK: Right.

23 MR. GILSTRAP: That's the problem.

24 CHAIRMAN BABCOCK: Sarah's view is that, you  
25 know, this is a big deal, and there ought to be additional

1 kind of burdens put on the movant in a situation like  
2 this, because it's such a big deal.

3 HONORABLE SARAH DUNCAN: Well, the whole  
4 306a concept and line of cases, the trial court frequently  
5 doesn't have jurisdiction, and what we're trying to do in  
6 306a is reconstitute the trial judge, trial court, with  
7 jurisdiction.

8 CHAIRMAN BABCOCK: Yeah, Richard.

9 MR. ORSINGER: I just don't see that this is  
10 a problem. I mean, right now under our current procedure  
11 there is no forfeiture by failure to get a hearing, is  
12 there? Do you have to have a hearing -- do you have to  
13 have a favorable ruling by a certain date or its  
14 overruled? Is that built into the current process?

15 HONORABLE SARAH DUNCAN: It depends on the  
16 court you're in. Depends on the court of appeals.

17 MR. ORSINGER: Well, and these things almost  
18 never come up, and filing a motion doesn't change the  
19 judgment. You can still get execution on it. If the  
20 court of appeals has called this to your attention on a  
21 motion to dismiss, your appeal is going to be dismissed if  
22 you don't get a hearing; and if you filed this for some  
23 reason other than to preserve your appeal, the motion is  
24 just going to lay there and have no effect on anybody;  
25 and, unlike Bill Edwards, I wouldn't race down to the

1 courthouse and put it to the test. I would just let it  
2 sit. I'd get my writ of execution out, whatever, because  
3 I've got a valid, subsisting judgment. So I don't really  
4 care if we put a deadline on people, but I don't think it  
5 matters whether we do or don't. I mean, just filing this  
6 motion doesn't really change anything, so if it sits  
7 there, it has no effect.

8 MR. EDWARDS: You can't get an execution  
9 because if you're in the court of appeals you haven't got  
10 a final judgment, but you can file an abstract of judgment  
11 lien and definitely make a difference.

12 MR. ORSINGER: Okay. If they posted a  
13 supersedeas bond and you can't get a writ out then you  
14 want to see your appeal dismissed. I mean --

15 HONORABLE SARAH DUNCAN: Am I understanding  
16 you correctly, Richard, that you don't think the moving  
17 party should have a responsibility to request a hearing?

18 MR. ORSINGER: I don't really care. This is  
19 such an enormously small part of everyone's practice. I  
20 mean, I have been practicing law 25 years. This has  
21 happened once, and I don't know if I know of any other  
22 lawyer that does -- of people trying to go back and open  
23 it up. But, you know, if I'm wrong and this is happening  
24 more than I think, you know, it doesn't -- it's like I  
25 said, the person who wants it done usually has a reason.

1 If you have no appeal, it doesn't do you any good to date  
2 your judgment three days later.

3           The only people who are going to do this are  
4 people that want to preserve their appeal. The appellate  
5 court is going to dismiss their appeal if they don't bring  
6 them some kind of ruling. So I think it's self-limiting  
7 or self-controlling, but I don't feel real strongly that  
8 we shouldn't have a deadline. I just think it doesn't  
9 matter.

10           CHAIRMAN BABCOCK: Nina.

11           MS. CORTELL: I think there's some  
12 attraction to setting forth the parameters for the  
13 procedure, sort of an open and shut mechanism. So I would  
14 be in favor of a mandatory with the addition, Chip, of  
15 your suggestion that if it's not requested within a  
16 certain number of days it's deemed overruled. I would  
17 second that.

18           CHAIRMAN BABCOCK: What do you think about  
19 adding that sentence in, Sarah?

20           HONORABLE SARAH DUNCAN: That's fine.

21           CHAIRMAN BABCOCK: Okay. Do you want to --  
22 if we add that sentence, is it okay to leave it that  
23 either party can ask for a hearing?

24           MR. ORSINGER: Well, you don't want the -- I  
25 mean, all of the sudden by doing that then the responding

1 party may be at a disadvantage if they can't request a  
2 hearing because if it's deemed overruled then I think the  
3 party can still go to the appellate court to complain  
4 about that. Can they not get appellate review of the  
5 refusal to grant this?

6 HONORABLE SARAH DUNCAN: Of the denial of a  
7 306a motion?

8 MR. ORSINGER: Yes. Can't you take that to  
9 the court of appeals and complain the trial judge should  
10 have reopened it? So I think the respondent should have a  
11 right to a hearing.

12 CHAIRMAN BABCOCK: That's what I said.

13 MR. ORSINGER: Because the movant may want  
14 to just lay low, you know, have the affidavits down there,  
15 nobody files a reply, no hearing is requested. Then after  
16 so many days it's overruled by operation of law and now  
17 the only evidence on it is an affidavit that would support  
18 it, so you run up to the court of appeals, and, you know,  
19 I think the respondent ought to have the opportunity to  
20 have a hearing where they can present evidence if the  
21 respondent wants to.

22 HONORABLE SARAH DUNCAN: But why would the  
23 respondent want to have a hearing?

24 MR. ORSINGER: Because the affidavit --

25 HONORABLE SARAH DUNCAN: If the movant does

1 not request a hearing within 10 days after filing the  
2 motion, it's denied.

3 MR. ORSINGER: Okay.

4 MR. EDWARDS: I think the way you can effect  
5 that, if you went into Option 1 right ahead of where it  
6 says "the court shall determine" if you put in "after the  
7 hearing the court shall determine."

8 MR. ORSINGER: The problem I can foresee is  
9 that somebody may file one of these motions and not  
10 request a hearing. The respondent doesn't file  
11 counter-affidavits. If by operation of law the motion is  
12 denied then the movant goes to the appellate court and  
13 says, "Look, I've got an affidavit right here from my  
14 client that says they didn't receive actual notice. I  
15 signed an affidavit I didn't receive actual notice. It  
16 was overruled by operation of law. There's no fact issue  
17 here. It should have been reopened." Now, the respondent  
18 ought to have an opportunity to request a hearing so they  
19 can cross-examine these people or confront them with  
20 contrary evidence or something if you're going to say it's  
21 overruled by operation of law. If you're just going to  
22 let it float until the appeal is dismissed, it's not so  
23 important.

24 CHAIRMAN BABCOCK: Nina.

25 MS. CORTELL: Can't we build in the concept



1 that it's waived if you don't request a hearing?

2 MR. ORSINGER: Yes.

3 HONORABLE SARAH DUNCAN: Yeah.

4 MR. ORSINGER: I would prefer that to saying  
5 that it's overruled by operation of law.

6 MS CORTELL: Okay. Then I would agree with  
7 that.

8 HONORABLE SARAH DUNCAN: My confusion is, is  
9 that I don't think about it being denied. It's just --

10 MS. CORTELL: Right.

11 HONORABLE SARAH DUNCAN: -- the trial  
12 court's jurisdiction is not reinvoked and there's no  
13 authority to change the date of the judgment.

14 CHAIRMAN BABCOCK: Try this. "Not later  
15 than 10 days after the filing of the motion any party may  
16 request a hearing on the motion, and the court must hear  
17 the motion as soon as practicable. If a hearing is not  
18 requested within the time prescribed, the motion is  
19 waived."

20 MR. ORSINGER: Okay.

21 MR. EDWARDS: Yeah.

22 MR. HAMILTON: "The hearing is waived."

23 MR. ORSINGER: No, "the motion is waived."

24 HONORABLE SARAH DUNCAN: "If a hearing is  
25 not requested."

1 CHAIRMAN BABCOCK: Yeah. "If a hearing is  
2 not requested."

3 HONORABLE SARAH DUNCAN: Can you keep going?

4 CHAIRMAN BABCOCK: "Within the time  
5 prescribed, the motion is waived," period.

6 MR. HAMILTON: But if the motion is waived,  
7 that's the same thing as saying it's overruled, so that  
8 could still go --

9 MR. EDWARDS: No.

10 MR. HAMILTON: You can't go up on appeal as  
11 to whether or not --

12 CHAIRMAN BABCOCK: I don't think so.

13 MR. EDWARDS: Not if it's waived.

14 CHAIRMAN BABCOCK: Not if it's waived.

15 MR. EDWARDS: I don't think so.

16 MR. GILSTRAP: You can appeal it, but you  
17 lose on waiver instead of on the merits.

18 CHAIRMAN BABCOCK: "Show me in the record,  
19 Mr. Hamilton, where you requested a hearing."

20 MR. WATSON: So that we prevent Richard as  
21 the respondent from wanting a hearing, from getting his --

22 CHAIRMAN BABCOCK: I'm sorry, Skip, couldn't  
23 hear you.

24 MR. WATSON: That would prevent someone like  
25 Richard from requesting a hearing as a respondent so he

1 could get his evidence in. There's either a hearing or  
2 nothing, right?

3 CHAIRMAN BABCOCK: Yeah.

4 MR. ORSINGER: Well, unlike Bill, I'm not  
5 going to request a hearing if they don't request a  
6 hearing.

7 MR. WATSON: That's my point.

8 MR. ORSINGER: I don't mind if I have a  
9 loose end.

10 CHAIRMAN BABCOCK: Yeah, I mean, why would  
11 you request a hearing if they don't?

12 MR. ORSINGER: I wouldn't, but if they  
13 request a hearing then I want --

14 MR. WATSON: Yeah.

15 MR. EDWARDS: As long as the court doesn't  
16 have authority to decide the thing on the basis of what's  
17 in front of it without a hearing.

18 HONORABLE SARAH DUNCAN: Right.

19 CHAIRMAN BABCOCK: Right. There might be  
20 circumstances where the responding party, the nonmovant,  
21 would want a hearing, but I can't hardly imagine any.

22 MR. EDWARDS: Not if there's a waiver in  
23 there.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. ORSINGER: Well, I mean, if you think

1 they're lying then you need to have a hearing to prove  
2 that because it's hard to prove that in an affidavit.

3 CHAIRMAN BABCOCK: Yeah. Well, if it's  
4 accurate --

5 MR. EDWARDS: If their failure to ask for a  
6 hearing is a waiver of their motion, you don't care what's  
7 in there.

8 MR. ORSINGER: I agree.

9 CHAIRMAN BABCOCK: Yeah.

10 MR. ORSINGER: I agree.

11 CHAIRMAN BABCOCK: Judge Brown.

12 HONORABLE HARVEY BROWN: I guess one reason  
13 you might ask for a hearing as a respondent is that the  
14 movant might request a hearing in a way that no one  
15 notices. I mean, you know, it's at the bottom of the  
16 pleading, "Defendant requests a hearing." The clerks  
17 don't see it, the judge doesn't see it, and it sits there,  
18 and you're the responding party, you want it over with.  
19 That might be a time to push it.

20 CHAIRMAN BABCOCK: That's right. That could  
21 be.

22 MR. ORSINGER: Now that you've said that  
23 everybody will get that idea.

24 CHAIRMAN BABCOCK: At page 3006 of the  
25 record.

1 MR. ORSINGER: That's like telling kids,  
2 "Don't put beans in your ears."

3 HONORABLE SARAH DUNCAN: I hate to be too  
4 technical about this, but I will be. Two points. I'm  
5 still not comfortable with the "not later than any party  
6 can request a hearing."

7 CHAIRMAN BABCOCK: Why is that important,  
8 Carl?

9 MR. HAMILTON: Well, that's what the  
10 Legislature says we have to use.

11 HONORABLE SARAH DUNCAN: Oh, I'm not talking  
12 about the language. I'm talking about the "any party may  
13 request." I think the responding party must request and  
14 if the responding -- if the moving party doesn't request  
15 --

16 CHAIRMAN BABCOCK: Okay. Yeah.

17 HONORABLE SARAH DUNCAN: This is where I'm  
18 getting kind of technical. I don't think you can waive a  
19 motion.

20 MR. HAMILTON: It doesn't make any sense to  
21 say the motion is waived. Then why would somebody file  
22 it, if they're not going to request a hearing? If they  
23 file a motion and they don't request a hearing, they know  
24 it's going to be waived. So why would they even file it?

25 MR. EDWARDS: Well, it's just a way of --

1 MR. HAMILTON: They're going to ask for a  
2 hearing in their pleading if they file a motion, so this  
3 is all sort of academic.

4 CHAIRMAN BABCOCK: Well, if this rule is  
5 written this way, they're going to ask for a hearing.

6 MR. HAMILTON: Sure.

7 MR. ORSINGER: And they're going to bury it  
8 in the middle of some long sentence, like Harvey is  
9 saying, that no one notices they asked for a hearing.

10 HONORABLE SARAH DUNCAN: My technical point  
11 is it's just the language we're using. I don't think you  
12 waive motions. I think you waive rights.

13 MR. HAMILTON: Well, to hearings. Rights to  
14 hearing.

15 MR. WATSON: You're waiving the relief.

16 CHAIRMAN BABCOCK: Right. The relief  
17 requested in the motion is waived.

18 HONORABLE SARAH DUNCAN: You're waiving the  
19 right to get the date of judgment redetermined.

20 MR. WATSON: Correct. You're waiving the  
21 right for the relief you're requesting.

22 HONORABLE SARAH DUNCAN: Right.

23 MR. GILSTRAP: So how do you say that?

24 PROFESSOR CARLSON: You're waiving the  
25 grounds for the motion.

1 MR. EDWARDS: "Grounds for the motion are  
2 waived." That's how you say it.

3 CHAIRMAN BABCOCK: Well, that seems too  
4 simple.

5 MR. EDWARDS: Sorry about that.

6 CHAIRMAN BABCOCK: Way too easy. I mean, if  
7 the motion is waived, everything in it's waived, right?

8 MR. HATCHELL: You could file another one  
9 then under this rule.

10 MR. WATSON: Just say "the complaint is  
11 waived" or, you know --

12 CHAIRMAN BABCOCK: "The relief requested is  
13 waived"?

14 MR. WATSON: "The right to relief is  
15 waived."

16 CHAIRMAN BABCOCK: "The right to relief is  
17 waived."

18 MR. GILSTRAP: "Right to obtain" --

19 HONORABLE SARAH DUNCAN: Except there's not  
20 a right to relief.

21 MR. HATCHELL: "The grounds of the motion  
22 are waived."

23 CHAIRMAN BABCOCK: "The grounds of the  
24 motion are waived."

25 HONORABLE SARAH DUNCAN: There's no right to

1 have the date of judgment changed.

2 MR. WATSON: Then the relief requested is  
3 waived.

4 CHAIRMAN BABCOCK: The grounds -- say that,  
5 Mike.

6 MR. GILSTRAP: "The party cannot obtain  
7 relief under this rule."

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: We started this off by  
10 agreeing we needed mandatory hearings. Why don't we just  
11 go back to that and say that when the motion is filed  
12 there shall be a mandatory hearing in a certain time  
13 unless both parties waive the right to the hearing, at  
14 which time the court can decide it on the affidavits.

15 HONORABLE SARAH DUNCAN: I don't think the  
16 court should be able to decide it on the affidavits. I'm  
17 sorry. I just can't go there.

18 MR. HAMILTON: Then just have a mandatory  
19 hearing.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: But, again, if we put the waiver  
22 on the request for hearing and we go back to the situation  
23 we talked about earlier, it just gets lost in the shuffle,  
24 he hadn't waived it, but yet there hadn't been a hearing  
25 and it's still dangling. Do we want to put something in



1 there that "must request and use reasonable efforts to  
2 obtain" or do we have to put something in like we do in  
3 the 296 where we say findings of fact and conclusions, if  
4 he doesn't do it then you have to give notice of failure  
5 or something? I mean, it might not be a waiver and yet  
6 you don't get a hearing. Because if it's just request for  
7 hearing, all you have to do, and you make the request and  
8 you don't get a hearing, what happens then? It's not  
9 waived.

10 HONORABLE SARAH DUNCAN: It's not waived,  
11 but until you get the date of judgment changed, you  
12 haven't improved your position, and that's why I say I  
13 assume --

14 MR. LOW: I know, but can the trial judge  
15 then without -- I mean, he can't do anything then without  
16 a hearing. If he doesn't have a hearing, it stays. I  
17 just don't want to lull people into security thinking they  
18 haven't waived it or something is going to happen if they  
19 request a hearing, that's all they have to do, and the  
20 judge might decide it.

21 With the waiver -- in other words, I can see  
22 waive if you don't use efforts. The judge -- I make a  
23 motion for a hearing, ask for a hearing. Judge says,  
24 "Okay, I'm in trial," you know, there's the clerk and he  
25 says, "I'm in trial and I'll give you a hearing in a few

1 days" and then time passes and he forgets, something else,  
2 then do I have the burden of reminding him that I've got  
3 to have a hearing?

4 HONORABLE SARAH DUNCAN: You have the burden  
5 of getting the date of judgment changed.

6 MR. LOW: Right.

7 HONORABLE SARAH DUNCAN: If the trial  
8 judge --

9 MR. LOW: Doesn't have a hearing.

10 HONORABLE SARAH DUNCAN: -- doesn't have a  
11 hearing, you don't get the date of judgment changed.

12 MR. LOW: Okay.

13 HONORABLE SARAH DUNCAN: So I assume that  
14 you're going to do whatever it takes to get your hearing  
15 to get the date of judgment changed.

16 MR. LOW: I agree. I just didn't want the  
17 rule to mislead somebody into thinking something else is  
18 going to happen if you just -- that it hadn't been waived  
19 because you're requesting a motion, you know, requested a  
20 hearing, I'm sorry; and as long as that language -- I  
21 realize we can't, as stated earlier, tell people how to  
22 practice law; and you better first file -- give notice to  
23 your malpractice carrier and then do everything you can;  
24 but I just don't want the rule to be misconstrued where  
25 somebody thinks that if I filed a motion and then that's

1 all I have to do.

2 CHAIRMAN BABCOCK: Buddy, how about this?  
3 Bear with me because I've written a lot of things. "Not  
4 later than 10 days after the filing of the motion any  
5 party" -- I was going to -- "any party must"?

6 HONORABLE SARAH DUNCAN: No.

7 MR. LOW: No. "Any party who desires a  
8 hearing" or --

9 HONORABLE JAN PATTERSON: "Seeking."  
10 "Anyone seeking."

11 HONORABLE SARAH DUNCAN: But why are we  
12 saying that the respondent can request a hearing? Of  
13 course the respondent can request a hearing. Anybody can  
14 request a hearing. What we care about is that the movant  
15 has to request a hearing. So I don't --

16 MR. LOW: Right.

17 CHAIRMAN BABCOCK: Okay.

18 PROFESSOR CARLSON: Well, I think with  
19 waiver that makes sense.

20 CHAIRMAN BABCOCK: Okay. So we go back to  
21 that.

22 PROFESSOR CARLSON: Yeah.

23 MR. EDWARDS: I think if we use the language  
24 that's there and then in the second sentence make it clear  
25 that the court can't decide the motion until after the

1 hearing that's been requested --

2 MR. LOW: Right.

3 MR. EDWARDS: -- we take care of Richard's  
4 problem, and anybody can ask for a hearing at any time,  
5 and so if the movant hasn't pushed to get the hearing, the  
6 respondent to that motion can always push the hearing.

7 MR. LOW: Right.

8 MR. EDWARDS: But the way it's written right  
9 now, it says -- it doesn't limit the court's power to  
10 decide that motion to a time after it's had the hearing  
11 where Richard's client can put on oral testimony to  
12 controvert the affidavits that are sitting there in front  
13 of the judge.

14 MR. CHAPMAN: Start that second sentence  
15 "Upon hearing, the court shall..."

16 MR. EDWARDS: Something like that, yeah.

17 MR. CHAPMAN: And then it makes it clear  
18 that a hearing is required.

19 CHAIRMAN BABCOCK: Okay. What about that  
20 waiver thing? Are we going to leave that out, or are we  
21 going to put that in?

22 MR. EDWARDS: I think that anybody that's in  
23 that position that -- I agree with the other folks who  
24 have spoken in here that that request is going to be in  
25 the motion.

1 MR. HAMILTON: The motion itself is a  
2 request for a hearing.

3 MR. EDWARDS: Well, that's what I'm saying,  
4 but you're going to put in there -- one of the standard  
5 lines is going to be I -- "Movant requests a hearing on  
6 this motion at the earliest practicable time."

7 CHAIRMAN BABCOCK: Yeah.

8 MR. EDWARDS: I mean, it's just a sentence  
9 in the motion.

10 CHAIRMAN BABCOCK: Yeah. Okay. So what  
11 language do you think we should add to this second  
12 sentence? "Upon hearing the court shall determine"?

13 MR. EDWARDS: Something like that, because  
14 that really does put the heat on the movant to get the  
15 hearing because they're up against the deadline of the  
16 court of appeals dismissing for want of jurisdiction.

17 CHAIRMAN BABCOCK: Yeah. Okay. "Upon  
18 hearing, the court shall determine the motion on the basis  
19 of the motion and response," et cetera, et cetera. Does  
20 that work?

21 MR. EDWARDS: I think so.

22 MR. HAMILTON: I think it ought to say "not  
23 later than 10 days after the filing of the motion, the  
24 court must hear the motion" -- well, forget all that.  
25 Just say, "After the filing of the motion, the court must

1 hear the motion as soon as practicable. The court shall  
2 determine the motion on the basis of..." Because the  
3 motion itself is -- they wouldn't be filing it if they  
4 didn't want it heard.

5 CHAIRMAN BABCOCK: In this instance that's  
6 probably right.

7 MR. HAMILTON: Why require anybody to  
8 request it? Just say within so many days of the filing of  
9 the motion the court must hear it.

10 HONORABLE SARAH DUNCAN: But we talked about  
11 that in the subcommittee, and the problem we had with  
12 specifying the time within which it must be heard is --

13 MR. HAMILTON: Well, "within 10 days or as  
14 soon thereafter as practicable."

15 MR. ORSINGER: Does that mean the respondent  
16 can't get a continuance to take a deposition?

17 MR. HAMILTON: No. It doesn't mean that.

18 MR. ORSINGER: Well, you just said they've  
19 got to have the hearing within 10 days, right?

20 MR. HAMILTON: You don't need the 10 days.  
21 Just "as soon as practicable." "As soon as practicable  
22 the court shall hear the motion" and that --

23 HONORABLE SARAH DUNCAN: That's what we have  
24 in the Option 1. The sentence I'm having trouble with is  
25 the waiver concept. I'm not exactly sure how to write it.

1 MR. GILSTRAP: "The party shall waive its  
2 rights to obtain relief under paragraph 4."

3 CHAIRMAN BABCOCK: Yeah. The way I wrote  
4 it, Sarah, was "If a hearing is not requested within the  
5 time prescribed, the relief requested in the motion is  
6 waived."

7 MR. GILSTRAP: That works.

8 CHAIRMAN BABCOCK: Not if you saw the look  
9 on her face.

10 MR. GILSTRAP: Works for me.

11 MR. ORSINGER: I think we might be at risk  
12 of being a little too hypothetical here. This is a very,  
13 very small part of anyone's practice.

14 CHAIRMAN BABCOCK: I know.

15 MR. ORSINGER: We've put more time in it  
16 just today than the whole state of Texas will in a month.

17 HONORABLE SARAH DUNCAN: I think your  
18 practice is unusual. If you look at published opinions on  
19 306a motions, it's not an infrequent occurrence.

20 MR. ORSINGER: I didn't know there was  
21 anyone else in here that had had one of these.

22 MR. EDWARDS: I have.

23 MR. ORSINGER: You did? You've been  
24 practicing law 35 years and you had one?

25 MR. EDWARDS: I don't know how many.

1 MR. GILSTRAP: Well, you know, but in theory  
2 it could happen, Richard. I mean, these people are  
3 messing up. They didn't get notice of the service and  
4 they didn't get notice of the judgment, and so I could  
5 foresee a situation where people start waking up, and you  
6 can wake up up to nine months out.

7 MR. ORSINGER: But, I mean, all our concerns  
8 about the wording and whether we have to waive the motion  
9 or waive the relief in the motion or all these other  
10 things, this is really very simple. We ought to just  
11 decide what we want to do and then write some plain  
12 language there and not worry about whether it's  
13 theoretically correct or not.

14 MR. LOW: The problem is what we want to do.  
15 If we knew that, we could write it.

16 CHAIRMAN BABCOCK: Okay. Sarah, solve this.

17 MR. HATCHELL: I'd like to ask just a  
18 theoretical question.

19 CHAIRMAN BABCOCK: Oh, no.

20 MR. HATCHELL: With this notice that we're  
21 waiving the right to relief under a motion, but also now  
22 that we've changed it you can file a motion at any time,  
23 so you waive the right under motion one. Can you just  
24 turn around and file another one?

25 HONORABLE SARAH DUNCAN: Yes.



1 CHAIRMAN BABCOCK: Well, the only  
2 alternative to that is that you overrule it by operation  
3 of law, but then you raise the issue that they can take it  
4 on appeal and they're directly -- it looks like chipping  
5 games.

6 MR. ORSINGER: How about we say "permanently  
7 waived"?

8 MR. GILSTRAP: If you say you waived the  
9 right to the relief set forth in paragraph 4 --

10 CHAIRMAN BABCOCK: Yeah.

11 MR. GILSTRAP: -- then that covers all  
12 motions.

13 CHAIRMAN BABCOCK: You would think so.

14 MR. HATCHELL: That probably would.

15 HONORABLE DAVID PEEPLES: Chip, back to  
16 Richard's point, Sarah, were you saying that there are a  
17 lot of reported cases on the waiver and requesting a  
18 hearing or just on 306a?

19 HONORABLE SARAH DUNCAN: On 306a.

20 HONORABLE DAVID PEEPLES: I've had, you  
21 know, a dozen of those. I've never had this issue of oral  
22 hearing and waiver and so forth come up, which we have  
23 been spending the time on. I think Richard's right about  
24 that.

25 MR. WATSON: That's because we're trying to

1 create it.

2 MR. ORSINGER: We're trying to create the  
3 problem, are you saying?

4 MR. WATSON: We're trying to create the  
5 issue of what happens if you don't request a hearing.

6 HONORABLE DAVID PEEPLES: But there's no  
7 problem out there we're trying to fix. Are we right about  
8 that?

9 MR. ORSINGER: I think that's right.

10 HONORABLE SARAH DUNCAN: No. There is a  
11 problem. In some of the courts of appeals the reason we  
12 don't ever reach the issue of whether there has to be an  
13 oral hearing is because some of the courts of appeals say  
14 if your motion isn't exactly in compliance with the rule  
15 as it's now written, the trial court's jurisdiction --  
16 there's no 306a jurisdiction created. It's not  
17 jump-started, so we don't ever reach the question.

18 I think -- I think the reason I'm having  
19 trouble with the waiver sentence is that the way I have  
20 come to see 306a is not so much in terms of waiver of a  
21 right to anything as it is that it's the 306a movant who  
22 wants to get the date of judgment changed. If you don't  
23 request a hearing within 10 days, the trial court has no  
24 obligation to set a hearing, and without a hearing you're  
25 not going to get the date of judgment changed. So I think

1 the connection, to me, is not so much that the movant  
2 waives anything as it is that the trial judge can't decide  
3 a 306a motion without a hearing and the movant has to  
4 request one, a hearing, within 10 days. So if there's no  
5 request within 10 days, this motion can't be heard.

6 PROFESSOR CARLSON: So you don't have a  
7 problem --

8 HONORABLE SARAH DUNCAN: It can't be denied.  
9 It can't be granted. It can't be anything. It can't be  
10 heard if the movant doesn't request a motion within 10  
11 days.

12 CHAIRMAN BABCOCK: Elaine.

13 PROFESSOR CARLSON: So you don't have a  
14 problem with the second motion if you don't request the  
15 hearing on the first one, because if there is no time  
16 period and all you lose is your right to a hearing on that  
17 motion then you don't have a problem with filing another  
18 motion?

19 HONORABLE SARAH DUNCAN: Huh-uh.

20 PROFESSOR CARLSON: Oh. Hmm.

21 HONORABLE SARAH DUNCAN: No. Just like  
22 right now, there is no prohibition on serial 306a motions.

23 CHAIRMAN BABCOCK: Judge Brown.

24 HONORABLE HARVEY BROWN: I'm sorry. I just  
25 think there should be. What's the point of having a rule

1 if we're going to say, "Well, if you don't do it, go ahead  
2 and do it 10 days later; and if you forget then, do it  
3 again."

4 CHAIRMAN BABCOCK: Yeah. That just doesn't  
5 seem right.

6 MR. EDWARDS: Well, if I'm the judge and  
7 somebody gives me a 306a motion and I overrule it and they  
8 file another one, we're going to be talking about some  
9 other rule than 306a.

10 CHAIRMAN BABCOCK: Well, but Sarah's  
11 hypothetical is you haven't made a ruling. They screwed  
12 up. They didn't ask for a hearing, but the only  
13 consequence to that is just go file another motion.  
14 That's what Sarah says the consequence of that is.

15 MR. EDWARDS: Well, the requirement that you  
16 request a hearing is one which an astute lawyer is going  
17 to include in his motion, if it means dying or not dying,  
18 but not every lawyer out there is totally astute. Not  
19 every lawyer out there is keyed into all these rules that  
20 much, and it's a trap that you don't need that's basically  
21 useless because they're going to -- most people are going  
22 to put it in the motion, and if it's not in the motion,  
23 it's going to be an oversight.

24 CHAIRMAN BABCOCK: Yeah. Good point. Carl.

25 MR. HAMILTON: Why do we need to treat this

1 motion any different than any other motion?

2 HONORABLE SARAH DUNCAN: Because it's  
3 seeking extraordinary relief.

4 MR. HAMILTON: So leave that up to the  
5 party, the party's lawyer, to get his hearing. Why not  
6 treat it like any other motion and he goes to the judge  
7 and he says, "Judge, I filed this motion. Here's an  
8 order. Can you give me a hearing on it?" And if the  
9 other side comes in and says, "Judge, the hearing is too  
10 soon. We need to do some discovery," then let the judge  
11 deal with it. I don't know why we need to treat it any  
12 different than any motion. So is an injunction.

13 HONORABLE SARAH DUNCAN: I don't think an  
14 injunction is -- I mean, if there are degrees of being  
15 extraordinary, I don't think an injunction is even  
16 remotely close to changing the date of a judgment.

17 MR. EDWARDS: Does anybody have any  
18 anecdotal or actual knowledge of a place where not getting  
19 a hearing on the 306a motion has caused a problem?

20 I rest my case.

21 MR. ORSINGER: I support what Carl is saying  
22 that just because you file the motion it doesn't change  
23 the judgment. The only thing they're going to file these  
24 is to save their appeal; and if they don't save their  
25 appeal, the court of appeals is going to dismiss it at

1 some point and then it goes away, so --

2 CHAIRMAN BABCOCK: What if you do this?  
3 What if we strike the first part of this Option 1 and just  
4 say, "The court must hear the motion as soon as  
5 practicable. Upon hearing," comma, "the court shall  
6 determine the motion on the basis," et cetera?

7 MR. ORSINGER: I'm fine with that.

8 CHAIRMAN BABCOCK: How about that, Sarah?  
9 Because what I hear developing here is even though you  
10 think the movant ought to have extraordinary burdens, I  
11 don't think anybody else does. I may be misreading the  
12 group, but at least anybody that's talking, I think that's  
13 where they're headed.

14 MR. CHAPMAN: What's your language again,  
15 Chip?

16 CHAIRMAN BABCOCK: I would just start -- on  
17 the Option 1 I would just start it by saying, "The court  
18 must hear the motion as soon as practicable." Leave out  
19 the first line of the rule and then "Upon hearing," comma,  
20 "the court shall determine..."

21 HONORABLE SARAH DUNCAN: How about "after  
22 hearing"?

23 CHAIRMAN BABCOCK: Excuse me?

24 HONORABLE SARAH DUNCAN: "After a hearing."

25 CHAIRMAN BABCOCK: Okay. Okay. So now

1 under my suggestion, "The court must hear the motion as  
2 soon as practicable. After a hearing the court shall  
3 determine the motion on the basis of," et cetera, et  
4 cetera, and the only other change would be "The  
5 affidavits, if any, shall be served at least seven days  
6 before the hearing unless a shorter period is allowed by  
7 the court for good cause."

8                   How does that work? Linda, that works for  
9 you? Okay. Everybody that's in favor of that language  
10 raise your hand, Bill.

11                   MR. EDWARDS: What is that now? Yeah, I'm  
12 in favor of that. I guess. What was the deal? That's  
13 the one you were talking about just before you restated,  
14 it, correct?

15                   CHAIRMAN BABCOCK: Yeah. Correct. Anybody  
16 opposed?

17                   That passes by a vote of 12 to nothing, the  
18 chair not voting because I was told that the chair  
19 shouldn't vote unless I have to break a tie. Okay. So  
20 that's -- we're done with that, right, Sarah, or do we  
21 need to talk about the TRAP rule?

22                   HONORABLE SARAH DUNCAN: No.

23                   CHAIRMAN BABCOCK: Okay. So we're done,  
24 right?

25                   HONORABLE SARAH DUNCAN: We're done.

1                   CHAIRMAN BABCOCK: We're in the books,  
2 right? Does everybody want to go to the cameras issue now  
3 or you want to take a quick little break? We've been  
4 going about an hour and 15. I hear a consensus for moving  
5 ahead. Richard.

6                   MR. ORSINGER: Okay.

7                   CHAIRMAN BABCOCK: We would have done this  
8 first off the bat, but you were late.

9                   MR. ORSINGER: I apologize. I didn't bring  
10 a razor, so I had to go buy one, and I got delayed.

11                  HONORABLE SARAH DUNCAN: Before Richard  
12 starts, if we could just tie up loose ends.

13                  CHAIRMAN BABCOCK: Yeah.

14                  HONORABLE SARAH DUNCAN: What do you want me  
15 or the subcommittee or you to do to get this to the Court?

16                  CHAIRMAN BABCOCK: Would you -- would you  
17 prepare the language that's been approved, send it to me,  
18 and then I'll send it to the Court? That would be great.  
19 Thanks.

20                  HONORABLE SARAH DUNCAN: Uh-huh.

21                  CHAIRMAN BABCOCK: Okay. Richard.

22                  MR. ORSINGER: Okay. I'm going to call upon  
23 Osler McCarthy, who is a representative from the Supreme  
24 Court of Texas, to discuss this issue with us. He has  
25 special knowledge of the matter.



1 CHAIRMAN BABCOCK: Oh, he does, does he?

2 MR. ORSINGER: Yes, he does.

3 CHAIRMAN BABCOCK: Okay.

4 MR. McCARTHY: I'm going to -- I woke up  
5 this morning not knowing whether this was going to be  
6 informal enough that I should come without a tie or formal  
7 enough that if I came without a tie I would offend the  
8 dignity of the meeting, so if you'll indulge me, I'm going  
9 to wear my Gonzaga give-me cap to add a little  
10 informality, make me feel better that I have a tie on, but  
11 I'm not quite so formal.

12 MR. HATCHELL: Put it on backwards.

13 MR. McCARTHY: And those of you who will be  
14 in Austin come the 1st of April and want to party with me  
15 as we watch the Final Four, Gonzaga versus Kansas or  
16 perhaps Duke --

17 HONORABLE SARAH DUNCAN: Duke.

18 MR. McCARTHY: You're welcome to join me,  
19 and I'm confident, and we'll take bets later.

20 The proposed rule that came out of this  
21 committee task force the Court had appointed was the  
22 result of an interim charge from Senator Ellis' office  
23 from the Legislature session a session or two sessions  
24 ago. What the interim charge asked was that there be some  
25 uniform guidelines for pooling arrangements for media

1 coverage of basically trials. What the committee believed  
2 was that that was putting the cart before the horse  
3 inasmuch as Rule 18c ostensibly addressed the issue, but  
4 not quite enough to really give trial courts guidance to  
5 get to the point of if you had multiple requests for  
6 coverage in a trial specifically, then how do you get to  
7 that point?

8           So this proposal supplements and proposes to  
9 supplant 18c, but the mechanics weren't the concern of the  
10 committee. The wording in some of the provisions were.  
11 Basically this proposal leaves all discretion in the trial  
12 court, just as 18c does. But it -- the committee intended  
13 to help trial courts unfamiliar, with some considerations  
14 on all sides, where you've got the media interested in  
15 covering with cameras, covering trial proceedings,  
16 specifically appellate proceedings also, but to give all  
17 the discretion to the trial court but help guide the  
18 discretion without sanctions.

19           So there are -- there's a proposal that it  
20 be -- that it be written that there not be any cost to  
21 someone moving for coverage in the courtroom, that there  
22 be service with a day's notice unless that's impractical,  
23 and the most practical notice time available if a day is  
24 not practical to all parties, that it be identifying, not  
25 as -- I believe the Supreme Court rule is, is that if you

1 come in five days beforehand and set out style number,  
2 anything that -- very specific requirements that in many  
3 respects are impractical to media that's not in the  
4 clerk's office familiar with each case that's coming in.

5           You know, generally the media, my experience  
6 both covering the Court and now dealing with people who  
7 cover the Court, is that you catch up with what the  
8 court's got on its agenda or on the docket, at our court  
9 probably a day before, the morning of. So it tries to  
10 give some provision for a three-day notice, but allow the  
11 court to change that. It allows -- encourages a hearing  
12 if there is a contest of the request for media coverage so  
13 that the court -- and then encourages by the trial court  
14 to set out its findings in writing.

15           The thinking of the committee, as I recall,  
16 was only that the trial court shouldn't be automatically  
17 dismissive and ought to contemplate why it is they've  
18 decided. So there is an encouragement in this proposal to  
19 open the courtroom to cameras, but again, leaves it to the  
20 full discretion, unfettered discretion, of the trial  
21 court. And then it goes through factors, a nonexclusive  
22 list of factors, that the trial court ought to consider.

23           Now, I keep talking about trial court, but  
24 the committee -- this was -- this was as applicable to the  
25 appellate courts as it is to the trial courts. They are

1 covered by the Rules of Appellate Procedure and a little,  
2 but not much more specific, than Rule 18c. It then also  
3 tries to factor in some technological considerations for  
4 the court. The -- you know, where the court might be  
5 concerned with and have an objection because of, say,  
6 identification of a witness, that the court ought to be  
7 mindful that there are ways to get around identification  
8 on camera, the blurry picture you see on television, those  
9 sorts of things. So, again, it's both educational  
10 encouragement to the trial court for the courts to  
11 consider technological ways to get around objections if  
12 that's a possibility.

13           It goes into coverage limitations, both  
14 mechanical and other, and then gives the court continuing  
15 supervision with the possible sanction by contempt and  
16 then finally brings up the horse and goes through pooling  
17 considerations, if you have something like Judge Wood had  
18 in Harris County where you've got a great lot of interest  
19 in a proceeding, how it is that you manage; and basically  
20 this proposed rule gives off to the media themselves the  
21 management of competing requests. In other words, pooling  
22 considerations. You work it out yourselves, and if you  
23 don't work it out then all is for naught. And that is  
24 basically it.

25           CHAIRMAN BABCOCK: Osler, let me ask you a

1 couple of questions. One, is this a -- you say the  
2 committee. Was this a subcommittee of this group or was  
3 it a different --

4 MR. McCARTHY: No. It was different. Judge  
5 Keller, I'm drawing a blank, Chip, on -- Judge Keller was  
6 a part of it. I'm sorry.

7 CHAIRMAN BABCOCK: Okay.

8 MR. McCARTHY: And, you know, because it was  
9 answering an interim charge it was basically the Court's  
10 appointees to go about looking at pooling requirements,  
11 and the Court decided, well, again, it's got to be one  
12 step before the other.

13 CHAIRMAN BABCOCK: There are local rules  
14 that have been approved by the Court in the large counties  
15 and some of the smaller ones as well. Did this committee  
16 look at those rules? They are pretty -- they are pretty  
17 standard. I mean, they're pretty much the same.

18 MR. McCARTHY: This reflects pretty much the  
19 best of all. We started to go outside Texas and decided  
20 that Texas -- where local rules had been adopted, Texas  
21 had adequately addressed considerations, especially the  
22 media interest.

23 CHAIRMAN BABCOCK: There is a -- there is a  
24 sentence in most of the local rules that says that there  
25 is a presumption in favor of coverage. That doesn't

1 appear to be in this. Was that deliberate?

2 MR. McCARTHY: Not as -- Michael, do you  
3 remember? Do you remember?

4 MR. SCHNEIDER: There was some question of  
5 whether or not that particular sentence was in the rules  
6 as proposed, that that might make it a little bit more  
7 difficult for a judge to assume that discretion was not  
8 entirely in their favor, and we left that sentence out.  
9 That is the case in some rules in some counties but not  
10 all of them.

11 CHAIRMAN BABCOCK: Yeah. I know a little  
12 bit about how that rule got into being, in case anybody  
13 cares. Judge Bill Rhea wrote the Dallas County rules and  
14 he inserted that sentence in there. Harris County picked  
15 it up. It's in their rules. Travis County, however, did  
16 not, and they were opposed to that, and Travis County  
17 instead came up with this laundry list of factors, most of  
18 which are exclusive rather than inclusive. So in Travis  
19 County, whether it worked out this way in practice or not  
20 I don't know, but the rule itself was structurally  
21 weighted against coverage; whereas, the other two counties  
22 were weighted in favor of coverage.

23 MR. YELENOSKY: Because Travis County is so  
24 conservative, right?

25 CHAIRMAN BABCOCK: Yeah. Go figure.

1 MR. GILSTRAP: Let me just say, having  
2 looked at the old Rule 18c and this, I mean, it's clear  
3 that the old rule, the tilt was away from coverage, and  
4 here the tilt is toward coverage. The old rule said the  
5 trial court may permit it only if certain things are met,  
6 and that language isn't here, and now we have stuff like  
7 "technological techniques that safeguard the protected  
8 interests are to be preferred over prohibiting all  
9 coverage," and to me the tilt is ultimately the ballgame.  
10 If it gets tilted toward coverage, we're going to have  
11 coverage, and my question is this: You know, yesterday we  
12 learned that there's really two kinds of questions the  
13 Court asks us. One is "Do you think we ought to do this,"  
14 and, two, "We're going to do it. How do you think we  
15 should?" Which one is this?

16 MR. HAMILTON: Under the old rule the  
17 parties had to consent to it also, and that's been left  
18 out.

19 CHAIRMAN BABCOCK: Under 18c unless there's  
20 a local rule you can't have electronic coverage.

21 MS. SWEENEY: You can't have what?

22 CHAIRMAN BABCOCK: You can't have cameras in  
23 the courtroom. The only way under the old 18c you would  
24 have it anywhere is if they had -- the county had adopted  
25 local rules, which 18c permits.

1 HONORABLE DAVID PEEPLES: Why was that the  
2 case?

3 MR. GILSTRAP: It doesn't say that.

4 CHAIRMAN BABCOCK: It doesn't say that, but  
5 the practical effect of that was you had to get the  
6 consent of all the witnesses, all the parties, all the  
7 lawyers, and no media organization would go through that  
8 exercise in order to get 18c, the state rule, coverage.  
9 That's just a fact of life.

10 MR. GILSTRAP: I think the real -- the real  
11 deal here is this: We've got elected judges, and if it  
12 gets tilted toward coverage, and the newspapers -- the TV  
13 people saying, "Well, this guy is not allowing us to  
14 cover," they're all going to allow coverage. So I think  
15 the tilt is the deal, and is the Court already tilted one  
16 way or the other?

17 MR. McCARTHY: Judge Peeples asked me that.  
18 I don't know that the Court has expressed an opinion  
19 informally or not. Basically there was the interim  
20 charge, "Take a look at it, task force," and we went from  
21 there, so I honestly can't answer. I would presume that  
22 if you took some gauge it's probably consensus to allow  
23 coverage, but I am not sure.

24 CHAIRMAN BABCOCK: And, Frank, what you just  
25 said is not true.



1 MR. GILSTRAP: Okay.

2 CHAIRMAN BABCOCK: There have been local  
3 rules in effect in all the major counties for over 10  
4 years, and there have been lots of trials that have been  
5 televised, but some that haven't been, and there hadn't  
6 been any criticism of the judges that have denied the -- I  
7 mean, there has not been this big media push that, "Oh,  
8 Judge Brown didn't let us in." I mean, that just hasn't  
9 happened.

10 MR. GILSTRAP: I could foresee it happening,  
11 Chip.

12 CHAIRMAN BABCOCK: Well, I mean, anything  
13 could happen. Anne.

14 MS. McNAMARA: Chip, I remember this  
15 committee having this exact same discussion on a Saturday  
16 about three years ago.

17 HONORABLE SARAH DUNCAN: Yes.

18 MS. McNAMARA: And one of the judges made  
19 exactly the point that Frank has, which is given the  
20 elective nature of the judiciary here, the presence of the  
21 media in the room would have an effect on how the case was  
22 handled, and, granted, we didn't have a big turnout on  
23 that Saturday morning, but the vote of the group was that  
24 we not pursue a liberalization of the policy.

25 MR. YELENOSKY: Right.

1 MS. McNAMARA: So here we are having a  
2 discussion which sort of assumes that somebody somewhere  
3 has decided on the liberalization. It would just be  
4 interesting to know how we got here.

5 CHAIRMAN BABCOCK: Believe it or not, it was  
6 seven years ago.

7 MS. McNAMARA: That long ago?

8 CHAIRMAN BABCOCK: Because I have been the  
9 chair for two and a half years and it was three years  
10 before, about three and a half years before that.

11 MR. YELENOSKY: I remember it, too.

12 CHAIRMAN BABCOCK: Yeah. Joe Latting was --  
13 I remember it vividly. He was up in arms about it. "How  
14 can we possibly allow it"?

15 MS. McNAMARA: But we took the vote, and  
16 everybody was against it.

17 CHAIRMAN BABCOCK: We took a vote, yeah.

18 MR. YELENOSKY: I was being facetious about  
19 Travis County, because actually I remember my position on  
20 this was that I was very cautious about liberalizing. I  
21 probably voted against it.

22 CHAIRMAN BABCOCK: And there have been --  
23 frankly, the action is not by and large in the civil  
24 courts. The action is in the criminal courts, and that's  
25 where -- that's where the media wants to be, and most of

1 the criminal courts don't have rules. Like Harris County,  
2 they had some rules, but then they got rid of them. Yeah,  
3 Buddy.

4 MR. LOW: Is this designed to be Rule 18c,  
5 or is this designed to be a Supreme Court rule or  
6 guideline promulgated by the Supreme Court within 18c?

7 CHAIRMAN BABCOCK: Chris knows the answer to  
8 that.

9 MR. GRIESEL: I know the answer to that and  
10 to Frank's question, which is how did this appear here.  
11 There are two issues that the Chief had in Judicial  
12 Council, both arising out of interim charges. This one,  
13 cameras in the courtroom/media pooling, and the other one,  
14 which has been assigned to Justice Duncan, the visiting  
15 judge review. In both of those cases the Judicial Council  
16 met, had some sort of formalized report, and it's not  
17 clear the shape of whether it takes place as a rule of  
18 judicial administration, whether it's a complete  
19 replacement of 18c.

20 Since the Judicial Council, while it does  
21 have public members, has a composition that's more  
22 judge-related than practitioner-related, he wanted to see  
23 what practitioners thought. Is this better as a  
24 replacement of 18c? Is this better as an override for  
25 statewide guidelines? Same thing with visiting judge peer

1 review issues, you know, what format should it take? This  
2 is really a "Here's what Judicial Council did. There's a  
3 lot of different avenues for changing the concept of the  
4 report or implementing the concept of the report, if you'd  
5 like to tell me what you think." It really is an advising  
6 -- advise issue more than a consent issue.

7 MR. LOW: See, I see this like --

8 MR. GILSTRAP: Thank you.

9 MR. LOW: -- when we drew 702 we didn't put  
10 every element. We put something general and then it  
11 follows, and I see this more as some guideline to come  
12 from the Court, quite frankly, rather than putting all  
13 these details in a rule. That's my own view, and I am  
14 willing to give it.

15 MR. ORSINGER: Well, 18a permits that,  
16 because -- and we do that, by the way, on the instructions  
17 to the jury. The Rules of Procedure authorize the Supreme  
18 Court to stipulate what the instructions to the jury are  
19 going to be, and they exist as a miscellaneous order of  
20 the Court. They are not actually in the Rules of  
21 Procedure. 18a says the Supreme Court can promulgate  
22 rules. It doesn't have to be a Rule of Procedure.

23 MR. LOW: Right.

24 MR. ORSINGER: You know, I think you could  
25 just have abstract stuff or you could have specific

1 criteria. To me the question here is do you want all the  
2 variety that exists around Texas and with some courts that  
3 have no local rules, or do we want to have a set of  
4 standards that through 18c, subdivision (a), apply to  
5 every state civil court?

6 MR. LOW: I don't disagree with that. I'm  
7 disagreeing where it should be placed. Is it of such  
8 importance that it ought to add another two or three pages  
9 to my book I buy each year, or should it be that the news  
10 media is interested in it, they can go obtain copies from  
11 the Supreme Court. The judges will have copies, and I  
12 could care less.

13 MR. EDWARDS: Well, if it's going to be  
14 rules promulgated pursuant to (c) you're going to buy the  
15 pages anyway.

16 MR. LOW: Well, okay. Yeah, I guess I will.

17 MR. ORSINGER: And I, frankly, think it  
18 ought to be under the authority of 18c(a) because that  
19 could be tweaked by the Supreme Court any time they want  
20 to issue a replacement order, but the rules amendment  
21 process is cumbersome --

22 MR. LOW: Well, that's my point.

23 MR. ORSINGER: -- requires us to consider  
24 it, and takes years to accomplish, usually.

25 HONORABLE SARAH DUNCAN: And as Chip says,

1 the action is in large measure in the criminal courts, and  
2 they're certainly not governed by the Texas Rules of Civil  
3 Procedure.

4 MR. GILSTRAP: Presumably the Supreme Court  
5 would want our input on the guidelines, though, whether  
6 it's a guideline or a rule amendment.

7 MR. LOW: It may, but we --

8 MR. GILSTRAP: Does that make sense?

9 MR. ORSINGER: Sure. I think we ought to  
10 debate it, and I don't -- I can remember one Saturday  
11 morning, Anne, when Harriet Myers led a vote that we  
12 should eliminate service by fax.

13 MS. McNAMARA: I remember that discussion,  
14 too.

15 MR. ORSINGER: Okay. Then the fact -- I  
16 mean, I don't know how that happened, but the committee is  
17 different now, and I don't feel bound by that vote.

18 MS. McNAMARA: I was very impressed that you  
19 were the only one who knew how those machines worked.

20 MR. ORSINGER: Yeah. Luke Soules --

21 CHAIRMAN BABCOCK: Is there anybody here  
22 besides myself who has participated in a trial that was  
23 covered by the electronic media?

24 MR. ORSINGER: Oh, I have, yeah.

25 HONORABLE DAVID PEEPLES: The whole trial?

1 MS. McNAMARA: What did you say?

2 MR. YELENOSKY: Has anybody been in a trial  
3 that was covered by the media?

4 MR. ORSINGER: I'll tell you, the problem I  
5 had, and the only problem I have with this, is that the  
6 media had shotgun microphones immediately behind the  
7 counsel table, and we asked the trial judge to make them  
8 turn the mikes off because we didn't want them to hear us  
9 talking to each other at the counsel table, and the judge  
10 asked the media, "Can you hear the lawyers when they're  
11 whispering at the table?"

12 "No, your Honor, no." And they had mikes  
13 this long, maybe three feet, behind me. I think if you  
14 can preserve your attorney-client privilege, as far as I'm  
15 concerned that's the only factor I care about. The rest  
16 of it, it's a public arena, important things happen, and I  
17 think that the people should have -- the media should have  
18 the right to let the people know about it.

19 CHAIRMAN BABCOCK: Linda.

20 MS. EADS: I agree with that principle.  
21 I've done a trial and I've done hearings. I mean, the  
22 hearing that involved the Governor when it was the Funeral  
23 Commission debate before -- his name escapes me now, the  
24 judge in Travis County. I mean, it becomes a much  
25 different event when you have media in the courtroom, and

1 that's just the reality. I mean --

2 CHAIRMAN BABCOCK: Are you talking about  
3 camera or media?

4 MS. EADS: Media.

5 CHAIRMAN BABCOCK: Okay. Well --

6 MS. EADS: And camera. Yeah.

7 MR. GILSTRAP: You always have a print  
8 reporter and the artist.

9 MS. EADS: Sure. You always do.

10 MR. GILSTRAP: We're talking about cameras.

11 MS. EADS: Right. I'm talking about  
12 cameras, and I think it makes it a much different event.  
13 I do think that it is public. I do think there's things  
14 about that that countermand the fact that it changes the  
15 event, but I think we would be -- I mean, we would just be  
16 living in a fantasy land if we said there wasn't a  
17 substantial change when we allow cameras in the courtroom.

18 CHAIRMAN BABCOCK: And, Linda, because I'm  
19 going to relate my experience in a minute, which is not  
20 the same, but how did you feel that it changed the event?

21 MS. EADS: Well, first of all, the judge --

22 CHAIRMAN BABCOCK: I'm talking about the  
23 camera now.

24 MS. EADS: The judge changed. The judge was  
25 much more -- this particular judge was much more reserved



1 than he usually is, and --

2 CHAIRMAN BABCOCK: Is that a bad thing?

3 MS. EADS: No. That's not bad thing. That  
4 was a good thing, and he also allowed a fuller discussion  
5 of the issues, which is also a good thing. The bad thing  
6 was that the attorneys, except for me, of course, I  
7 believe attempted to put things in the record that they  
8 knew were going to be objected to just to say it outloud  
9 in public.

10 I mean, things that are covered by the media  
11 are things that the public wants to know about, and there  
12 is a voyeuristic approach to this, and there's things that  
13 people want to hear that are juicy, and an attorney can  
14 abuse that, okay, and so, therefore, then for an attorney  
15 trying to counter that has the problem of "Do I object?  
16 I'm on camera. Do I want to look like I'm keeping  
17 evidence away, out?" You know, I mean, there's a pressure  
18 that comes with that that's not -- we always have that  
19 pressure on us as attorneys. We have the jury, but it's a  
20 much more intense pressure when we think it's going to be  
21 a news snippet on TV that night. You know, "Governor's  
22 lawyer objects to the question about whether or not he  
23 ever snorted cocaine." I mean, seriously, what do you do  
24 at that point?

25 CHAIRMAN BABCOCK: That would be true

1 whether there was a camera there or not if it was covered  
2 by the press, but what you're saying is that the  
3 television, the broadcast media, is more powerful --

4 MS. EADS: Right.

5 CHAIRMAN BABCOCK: -- and that's what the  
6 objection is. Frank.

7 MR. GILSTRAP: Look, cameras in the  
8 courtroom, we're doing fine. We were making progress.  
9 They had William Kennedy Smith. Remember that? And they  
10 had the witness who they were to keep her face covered.  
11 Well, they didn't.

12 CHAIRMAN BABCOCK: The blue dot.

13 MR. GILSTRAP: Yeah, the blue dot, and then  
14 O.J. Simpson happened, which was a complete disaster. It  
15 was -- it was -- it came close to being a social disaster  
16 in this country; and you couple cameras in the courtroom,  
17 a very high profile trial, and a weak judge, and you've  
18 got the recipe; and I don't think there's anybody here  
19 that wouldn't say that the TV coverage appeared to  
20 completely distort that thing. And here you're telling  
21 judges, "We need to push you toward allowing coverage,"  
22 and that may give -- it may just push that judge to a  
23 point that he loses control.

24 CHAIRMAN BABCOCK: Skip.

25 MR. WATSON: This is for Osler. Was the

1 Chief's initiative in this driven by the criminal court  
2 side of the Judicial Council or was it driven by the civil  
3 side or what?

4 MR. McCARTHY: I don't think either -- I  
5 mean, it was legislative-driven.

6 MR. WATSON: I understand.

7 MR. McCARTHY: But inasmuch as rule-making  
8 or at least the recommendation through the Judicial  
9 Council where the Legislature had asked for it to be  
10 considered, and generally that would be -- I mean, it  
11 balances civil and criminal.

12 MR. WATSON: Oh, I understand.

13 MR. McCARTHY: But for our consideration  
14 it's uncertain to me, and it was uncertain to Judge Keller  
15 when this first came up, as to whether this for criminal  
16 courts would have to go back through the Legislature.  
17 There's a feeling that maybe, maybe not, but for the civil  
18 courts then --

19 MR. WATSON: My only thought is, is that the  
20 primary interest, as everyone has said, is going to be  
21 criminal courts unless it's some remarkably high profile  
22 divorce or, you know, something sensational, and I don't  
23 see where it's a big deal for us to -- I mean, I don't  
24 think that the rules necessarily have to be the same for  
25 the Supreme Court as for the Court of Criminal Appeals,

1 and I can -- I almost see this kind of thing as being  
2 something that, you know, my tendency is wanting to keep  
3 it out of civil proceedings, and if the door opens, put it  
4 into criminal proceedings. I am not sure how practicable  
5 that is, but if there were a way to do it, I'd like to see  
6 it bent in that direction.

7 CHAIRMAN BABCOCK: So you would be in favor  
8 of withdrawing the local rules that are in existence?

9 MR. WATSON: No. No. It's just that --  
10 and, again, there are regional differences in this, Chip.  
11 The local rules, I mean, in my part of the country they  
12 just don't let them in, period. You know, they exercise  
13 that discretion, and the pressure to let them in would be  
14 to permit that in criminal cases.

15 CHAIRMAN BABCOCK: Yeah. Buddy.

16 MR. LOW: You know, I think we do have to  
17 face that our courts don't belong to the lawyers. They  
18 don't belong to the litigants. They belong to the people,  
19 and so to that degree, I think the public knowledge and  
20 the news media, that's certainly entitled to it.

21 The only thing I have problems with -- and I  
22 think this protects it -- is the jurors. I think that  
23 they have to be protected so that they don't feel like  
24 they're in focus, that they're -- it's not going to change  
25 their result and they're afraid that they're going to be

1 known by their neighbors as the one that turned John Jones  
2 loose and that kind of thing, and I think that it does  
3 offer some protection. But I think we have to come to  
4 focus on two things, that the news media is entitled to  
5 coverage, but we have to protect the litigants and the  
6 jury, and those -- when those interests conflict, I think  
7 then we have to focus on protecting the litigants and the  
8 jury, but otherwise it's a new day.

9 CHAIRMAN BABCOCK: Yeah. All the -- I think  
10 the local rules without exception, and the practice now  
11 nationally, is to prohibit filming of the jurors.

12 MR. LOW: Right.

13 MR. EDWARDS: This does not.

14 MR. ORSINGER: Yeah, it does.

15 MR. EDWARDS: It says you can't --

16 MR. LOW: It says "may."

17 MR. EDWARDS: It doesn't prohibit it. It  
18 says you can't focus on one in particular, but as I read  
19 this, you could pan the jury box.

20 MR. LOW: Right.

21 CHAIRMAN BABCOCK: Yeah, that's one of the  
22 reasons I asked how carefully the local rules had been  
23 looked at because there is an absolute prohibition.

24 MR. EDWARDS: There is not in here.

25 CHAIRMAN BABCOCK: And that's probably

1 something that needs some pretty serious consideration  
2 because --

3 MR. McCARTHY: Well --

4 CHAIRMAN BABCOCK: Go ahead.

5 MR. McCARTHY: May I interrupt? Unless  
6 there's something contrary, it's not intended. Under the  
7 first sentence under the subhead "Specific Restrictions of  
8 Coverage" on the page that has "Coverage Limitations" at  
9 the top, "No coverage of the jury or of any juror or  
10 alternate juror in the jury deliberation room or during  
11 recess shall be permitted."

12 MR. LOW: "Permitted."

13 MR. ORSINGER: That only protects them  
14 during deliberations. It doesn't protect the trial  
15 process, so when you're receiving evidence it's  
16 discretionary with the trial judge.

17 MR. EDWARDS: It says "may be disallowed."

18 CHAIRMAN BABCOCK: In fact, I think -- I  
19 think that this has got it absolutely backwards. I think  
20 in the courtroom --

21 MS. SWEENEY: Yeah.

22 CHAIRMAN BABCOCK: -- the jurors should not  
23 be -- there should not be coverage of the jurors in the  
24 courtroom for sure. They just shouldn't be shown. Now,  
25 if somebody is on the street, then, you know, that's

1 different. I mean, the court's authority doesn't --

2 MR. ORSINGER: You're talking about when  
3 they file in and out of the jury room.

4 CHAIRMAN BABCOCK: No. I'm talking about  
5 what this rule is talking about, putting a camera into the  
6 courtroom.

7 MR. LOW: Right.

8 CHAIRMAN BABCOCK: And so the rule ought to  
9 focus on prohibiting that camera from covering the jury or  
10 any one of them, top, side, or bottom, while they're in a  
11 courtroom.

12 MR. ORSINGER: I would like to make an  
13 argument we should protect the jury during deliberations  
14 as well.

15 CHAIRMAN BABCOCK: Well, sure, but, I mean,  
16 who's going to put a camera in the jury room?

17 MR. ORSINGER: Well, no, you said it has it  
18 backwards.

19 MR. GILSTRAP: Not this year.

20 CHAIRMAN BABCOCK: Paula wants one. She  
21 wants to know what's going on.

22 MR. ORSINGER: I don't think it has it  
23 backwards. I think what we're meaning to do is to protect  
24 the jury in the courtroom as well as we protect them  
25 during the deliberations.

1                   CHAIRMAN BABCOCK:  You've got no  
2 disagreement on me about that.  Stephen.

3                   MR. YELENOSKY:  I remain somewhat conflicted  
4 about this, and I think what you just said points out that  
5 this isn't just a question of the public's right to know  
6 because even you, as a defender of the media's rights, say  
7 that the jury should not be on camera when anybody can  
8 walk in the courtroom and watch the jury and write down  
9 what they're doing and how they're reacting.  So even you  
10 can see that there may be a limit on what the camera can  
11 see from what, quote-unquote, the public can.  So I think  
12 I disagree with Buddy there.  And the other reason I'm  
13 conflicted, which may have --

14                  CHAIRMAN BABCOCK:  You think the jury should  
15 be shown?

16                  MR. YELENOSKY:  No, I don't, but I think  
17 that conceding that point is important, makes an important  
18 point, that you, at least, haven't gone to the extent that  
19 maybe Buddy has in saying, "Well, it's open.  The public  
20 should be able to see it.  The camera should be able to  
21 see whatever anybody that walks in the courtroom can see."  
22 So we crossed some line here because at least most of us  
23 seem to think that the camera shouldn't be able to see  
24 what anybody who walks in the courtroom can see.

25                               And then my only second point is that this



1 may -- and this might be just something I have to figure  
2 out for myself. I think part of my conflict is just a  
3 dissatisfaction with the emphasis on entertainment in the  
4 choice of what court is to cover and that may be just some  
5 snobism. I don't know. Somebody who thinks that, you  
6 know, almost always the book is better than the movie, I  
7 tend to think that the choice that the media often makes  
8 is -- makes it harder for me to be in the forefront of  
9 supporting the right to get into the courtroom.

10 MR. LOW: No, you misquoted what I said.

11 MR. YELENOSKY: No, I didn't mean to --

12 MR. LOW: The protection of the jury, and I  
13 think there's a lot of difference in the juror seeing  
14 somebody walk in the courtroom and seeing the camera, and  
15 they say, "My God, where is that going?" I mean, there is  
16 a difference, a great difference, and that's why I said  
17 there has to be some balance on protecting. I never  
18 mentioned people walking in and out of the courtroom and  
19 the cameras.

20 MR. YELENOSKY: Well, then, I mean, I  
21 apologize if I was mischaracterizing what you said, but I  
22 think some people might conclude from a position that, you  
23 know, the camera is like the eye of the public that, well,  
24 then what's the justification for any protection, and I'm  
25 not saying you did. You corrected me on that.

1                   CHAIRMAN BABCOCK: Carl, then Anne.

2                   MR. HAMILTON: There's a great difference in  
3 the reports being made by someone who's in the courtroom  
4 and having the cameras there, and there are witnesses who  
5 will testify entirely differently if they know that what  
6 they're saying goes to the jury, goes to spectators in the  
7 courtroom and stops, as opposed to being shown on national  
8 television and becoming entertainment for the news media.  
9 I think that we need to preserve the rights under the  
10 present rule for objections and even maybe consent of the  
11 parties and witnesses before we allow the cameras.

12                  CHAIRMAN BABCOCK: Anne, let me just follow  
13 up. Are you saying that there is evidence that jurors  
14 change their testimony because the trial is covered by the  
15 media?

16                  MR. GILSTRAP: You mean witnesses.

17                  CHAIRMAN BABCOCK: I'm sorry. Witnesses  
18 change their testimony?

19                  MR. HAMILTON: Not change it, but just are  
20 more uncomfortable testifying if you've got a camera on  
21 them.

22                  CHAIRMAN BABCOCK: Well, that may be  
23 intuitively true, but is there any study that suggests  
24 that?

25                  MR. HAMILTON: I don't know about that, no.

1                   CHAIRMAN BABCOCK: I mean, I tried a case  
2 that was covered gavel-to-gavel for eight weeks, and I  
3 didn't have any witness say that, but, you know, maybe  
4 intuitively it's true. Anne.

5                   MS. McNAMARA: And I was going to say, I  
6 think intuitively it is true that if you've got a witness  
7 that's scared of the prospect of testifying in court,  
8 they're going to be that much more afraid if there's a  
9 camera rolling, and the presence of the print media and  
10 sketch artist is pretty unobtrusive. Once you put the  
11 camera in, I mean, if we could do studies, it would show  
12 that it does change the way they testify; and then you  
13 come back to what's more important, the right of the  
14 public to know or the right of the litigants to get a fair  
15 trial and to get a trial that's untainted by the dynamic  
16 changes that Linda was talking about.

17                   So I think -- then you inject sort of the  
18 unpleasant self-interest of judges and lawyers in the  
19 courtroom who may be less interested in the actual trial  
20 than the chance to look good on the evening news. Again,  
21 what's more important? Are we trying to preserve the  
22 right of a fair trial for litigatns, which I think is what  
23 the people have decided to punt.

24                   CHAIRMAN BABCOCK: I'll tell you that having  
25 been a participant in an eight-week trial, you have so

1 many more things to think about and do while you're trying  
2 a lawsuit than to worry about that camera back there, and  
3 for my own self, I completely forgot it was there and went  
4 about -- and I don't think anybody could say that I tried  
5 this case any differently than I have tried any other case  
6 of that type.

7 MS. McNAMARA: You would hope so, Chip, but  
8 I don't think everybody is that pure.

9 MS. EADS: Or that professional.

10 CHAIRMAN BABCOCK: Well, maybe so, but, you  
11 know, the media got blamed a lot for the O. J. case. My  
12 take on that is that you're shooting the messenger there.  
13 That was a -- you know, it just so happened that a case  
14 that was out of control with a weak judge was shown to a  
15 lot of people. Some people argue that that was good for  
16 the judicial system to see that.

17 MS. McNAMARA: Chip, I think, yeah, the  
18 media's doing its job. I think we could go back to  
19 questions of whether or not that was a proposal --

20 CHAIRMAN BABCOCK: Was what?

21 MS. McNAMARA: Let's forget about O. J. And  
22 I think decisions are made based -- you know, by the  
23 participants in the decision-making process with a view to  
24 the media, and then you have to ask whether or not that's  
25 in the best interest of the litigants. There were stories

1 back when Garcetti picked that venue that he did it for  
2 the size of the courthouse and the ability to accommodate  
3 the media, and he could have gone to a more conservative  
4 venue that would have been less media coverage.

5 CHAIRMAN BABCOCK: And gotten that  
6 conviction.

7 MS. McNAMARA: Yeah.

8 CHAIRMAN BABCOCK: Maybe.

9 MS. McNAMARA: Maybe.

10 CHAIRMAN BABCOCK: Yeah, Judge Patterson.

11 HONORABLE JAN PATTERSON: I have several  
12 thoughts, and my first is that there's this old saying  
13 that the main thing is to keep the main thing the main  
14 thing.

15 MR. YELENOSKY: Keep your eye on the prize.

16 HONORABLE JAN PATTERSON: And by that, I  
17 think that the purpose of a trial is to vindicate  
18 litigants' interest and to provide justice, and it is not  
19 to provide a visual forum. We do allow the press in the  
20 courtrooms, and there is extensive coverage. My own  
21 experience with press in the courtrooms is a fairly exotic  
22 one. It was in Europe at the trial of Klaus Barbie, and  
23 my impression from that experience was that rather than  
24 add to the understanding of the trial, the airing of the  
25 various views, what that turned out to be was trial by

1 deadline because there is -- I mean, you could see how  
2 proof was moved to meet the press deadline. The press  
3 would switch out to do its stories. The stories were  
4 remarkably similar covering the same dramatic testimony,  
5 and, of course, in that trial there was dramatic  
6 testimony, but there was also other important testimony  
7 that just got lost in the desire for drama.

8           I think that your experience of saying that  
9 it didn't affect the lawyers, I mean, lawyers are  
10 professionals. We're very intense during trials. We  
11 forget -- I mean, I don't really watch what's going on  
12 behind me that much because you become absorbed in the  
13 process; but I think that there are subtle influences and  
14 pressures on those who are not so absorbed; and whether  
15 it's witnesses or juries or judges, I think that it's hard  
16 to quantify the effect on those people. I do think it  
17 alters the process in very subtle ways, and as we've known  
18 from the days of Marsha McLewan, the media becomes the  
19 message and there is a -- it does affect the process  
20 itself.

21           I think the fact also has to be recognized  
22 that we're -- and this is a difficult issue for all of us,  
23 because we believe in open courts and we believe in the  
24 press and we recognize the importance of the first  
25 amendment and the press issues, but let's think what it

1 does add to our understanding of the process or those  
2 rights. I mean, are we really going to be seeing the  
3 asbestos cases or the summary judgment proceedings  
4 concerning important issues? No. We're going to be  
5 seeing a homeless man going through the windshield --

6 MR. YELENOSKY: Exactly.

7 HONORABLE JAN PATTERSON: -- type of trial  
8 or the Yates trial, and those are the ones that tend to  
9 attract the kind of drama that this will allow. I think  
10 that there's -- may not be anything wrong with having  
11 local rules because -- and allowing there to be some local  
12 differences because those judges may be sensitive to the  
13 press in their locales, the courtroom, the local  
14 traditions, and it may allow for them to treat these  
15 requests in individual ways; whereas, if we have a general  
16 rule annunciated from on high then that shifts the burden  
17 to the judge to justify what it is he or she does; and the  
18 press can always point to, "Well, in Amarillo they let us  
19 have this or that" or "We did this," and there becomes a  
20 more unified system, and the press pressure probably  
21 becomes stronger.

22 I think that, once again, I come around to  
23 what others have mentioned, I think very wisely, and that  
24 is regardless of the peer pressures or the modern  
25 sensitivities, that we all have to recognize that our

1 courtrooms are special places and that they are delicate,  
2 fragile places, and we need to be very thoughtful in  
3 tampering with the fragility of our system when it comes  
4 to very basic aspects of that system.

5 CHAIRMAN BABCOCK: Yeah, Buddy.

6 MR. LOW: You remember back when we were  
7 having a problem, the news media is the one that brought  
8 76a about. Remember --

9 CHAIRMAN BABCOCK: Yeah.

10 MR. LOW: -- they were sealing the Nixon  
11 tapes, and we lawyers say, "Well, yeah, we can do that,  
12 because that's going to affect trials," the public and  
13 then the jury panel, you haven't even picked the jury, and  
14 the community, or they're going to see these documents and  
15 these things. That has much more effect on what kind of  
16 jury you get than TV cameras in the the courtroom in my  
17 opinion, and we had to come about it because we can only  
18 seal them if it involved, you know, certain things and go  
19 through a procedure. So it's a changing thing. I wasn't  
20 for that because I'm for the old system, but I'm a man  
21 that changes from time to time.

22 HONORABLE JAN PATTERSON: We have a  
23 declining jury pool, though, and we have a fearful jury  
24 pool.

25 MS. EADS: Yes, we do. That's true.



1 MR. LOW: Well, again, I still think the  
2 news media -- I'm not saying they're entitled to go in  
3 every time and just -- and I'm not saying it should be  
4 just one rule. I'm saying that if we stay with this idea  
5 that let's favor keeping them out because it might affect  
6 whether this witness wears a red dress or a blue dress and  
7 how she's going to look on television, then that's not  
8 right. We should look and see and weigh what that does to  
9 the justice of the system. Unless it -- you know, unless  
10 there's some great injustice going to be done by it, let  
11 them in.

12 CHAIRMAN BABCOCK: Nina had her hand up  
13 first and then I think it was Linda and Richard and then  
14 Frank.

15 MS. CORTELL: I absolutely agree that there  
16 is opportunity for abuse. I think, Chip, you're probably  
17 not our example of someone who would allow it to be  
18 abusive, but certainly there are lawyers that would. That  
19 said, I think that there's a balancing that has to occur.  
20 I think that there are probably some good things to come  
21 out of the coverage of the Florida litigation, the  
22 Bush-Gore cases, and I think I'm comfortable leaving it  
23 with the discretion of the trial judge, to allow some  
24 guidelines and ultimately leave it there, because there is  
25 a balancing, as everyone has said, and there's always a

1 danger posed to the litigation and the integrity of the  
2 litigation, I think. I think there can be abuse.  
3 Frankly, I think there can be abuse with noncamera  
4 coverage. I think I've been part of that on occasion, so  
5 maybe I've just got to lick my war wounds and move on, but  
6 I'm comfortable leaving it ultimately to the discretion of  
7 the trial judge.

8 CHAIRMAN BABCOCK: Linda. Then who was  
9 next, Richard, and then --

10 MS. EADS: I echo what Nina says.

11 CHAIRMAN BABCOCK: Okay. Richard, you were  
12 going to say something.

13 MR. ORSINGER: Yeah. This raises a lot  
14 of -- I think this debate or discussion raises a lot of  
15 philosophical and political issues. I'm sitting here  
16 thinking about all the other components of our government  
17 that have been tainted by the cameras, and I think of the  
18 United States Senate hearings, and we know that they play  
19 to the cameras, and even the C-SPAN coverage  
20 gavel-to-gavel in the House and the Senate, and has that  
21 had a negative effect on those politicians? But then  
22 you've got to weigh that against American citizens seeing  
23 what's going on.

24 You know, what we're really short of is  
25 we're really short of personal experience and scientific

1 information. It's my understanding that Florida allows  
2 coverage routinely in their courts. I've seen it on Court  
3 TV. It's really boring, a lot of bad lawyering and  
4 unimportant trials, and it has not caused their judicial  
5 system to melt down that I'm aware of. I bet there are  
6 some studies that social scientists have conducted. I  
7 don't know what they say.

8           And, you know, very compelling arguments  
9 could be made that to protect the privacy of litigants,  
10 particularly in the family law area, that trials could be  
11 secret, no one but the participants should be allowed in.  
12 The jurors would feel entirely secure, et cetera,  
13 et cetera, but we live in a free society where ultimately  
14 people vote and their votes decide who our government  
15 officials are and determine our policies, and it's been  
16 part of the fabric of our philosophy that an informed  
17 public is in the best interest of all, even if you have to  
18 compromise some things in exchange for having an informed  
19 public.

20           One of the Federal courts in San Antonio has  
21 courtroom -- has cameras in the courtroom, and that is the  
22 way they make their record. They don't have a court  
23 reporter transcribing the notes. They just videotape all  
24 of the witnesses. I don't think it's -- a camera is not  
25 obtrusive. There's not a person there. You don't step

1 over wires or anything, and I think part of this problem  
2 is that our courtrooms are old and we don't have recessed  
3 cameras. I mean, if the media plugged into a pool camera  
4 that was in the ceiling that pointed to one thing and  
5 nobody in the courtroom even knew the media was looking,  
6 this is like a transitional issue for us; but I think  
7 there are plenty of examples of successful news coverage,  
8 and even where it's been -- I mean, the only time that  
9 it's really ever been really bad is where someone has been  
10 deprived of a fair trial; and the U.S. Supreme Court has  
11 articulated standards on how we protect the trial process;  
12 and, you know, I'm just not that scared of this issue. I  
13 mean, everything else about our society is public  
14 dissemination of information, and to me that's where my  
15 philosophy ends up on this issue.

16           Furthermore, I agree with Nina. If you're  
17 in a courtroom where you're being mistreated by the trial  
18 judge, the only protection you have is that the media  
19 might become aware of that and make an issue out of that.  
20 You know, ultimately you may get the case reversed, but if  
21 certain things are highly political, highly sensitive, the  
22 judge is very sensitized to it, the media is going to make  
23 that judge be fairer to the litigants, in my opinion. So,  
24 anyway, I just -- I have this kind of visceral inclination  
25 for openness.

1                   CHAIRMAN BABCOCK: Frank.

2                   MR. GILSTRAP: I think there's about four  
3 factors we're talking about. One is the effect on the  
4 trial, and we may all get to the point where Chip is,  
5 where we're totally comfortable in an electronic  
6 environment, doesn't bother us; but the fact is we're so  
7 concerned about keeping the camera off the jury because we  
8 know it will affect the jury; and the camera affects the  
9 jury, it's going to affect the witnesses, it's going to  
10 affect the judge. And, Chip, I bet if you had been in  
11 O.J. Simpson it might even have affected you as a lawyer,  
12 because I think those were veteran lawyers, and they were  
13 playing to the camera. It can get hot enough to where it  
14 even affects everybody.

15                   There's an educational factor. I was sick  
16 at home during the week of the William Kennedy Smith  
17 trial. I learned a whole lot. But, fine, if you want to  
18 watch a murder, you can watch one on Channel 4. It just  
19 comes from Maine. It's not one that's around here. If  
20 you want to get education, let the people get educated.

21                   The right of the people to know. The  
22 fact -- they have -- the people have a right to know  
23 everything that goes on in that courtroom, and it's  
24 reported; but simply because the people have a right to  
25 know doesn't mean it's a good idea to show it to them;

1 and, you know, the fact that this stuff is going to wind  
2 up on Entertainment Tonight doesn't help anybody at all.  
3 There's no good social thing that comes from that.

4           Finally, there is an effect on society. I  
5 don't know about you-all, but every trial I've ever been  
6 involved in has not been a pleasant experience for about  
7 half the people in the courtroom, the people that lost.  
8 It is imperfect. It is a last resort, and the people that  
9 lose never say, "Oh, justice was done." They say, "We  
10 were robbed. Something was wrong." It is a terrible  
11 experience for the losers, and when you put the TV  
12 audience out there and you divide them up, "I'm for the  
13 prosecution," "I'm for the criminal defendant," and one  
14 side loses, I don't see how that's helpful.

15           O. J. Simpson, we don't talk about. It was  
16 a terrible thing for race relations in this country, and,  
17 you know, on balance, on balance, and we all know where  
18 this is going to go. We all know that it's going to go to  
19 where the media is going to have the right to come in just  
20 about any time they want to show it. This thing in  
21 Houston, I don't know if it's being shown on TV. Is it?

22           CHAIRMAN BABCOCK: The Andrea Yates?

23           MR. GILSTRAP: Is it being shown on TV?

24           HONORABLE JAN PATTERSON: No.

25           CHAIRMAN BABCOCK: Well --

1 MR. GILSTRAP: Well, let's put it this way.  
2 If it could be, it would be.

3 CHAIRMAN BABCOCK: The judge --

4 MR. GILSTRAP: Because it's being reported  
5 on CNN.

6 CHAIRMAN BABCOCK: The judge allowed cameras  
7 for opening statement, closing argument, and return of the  
8 verdict.

9 CHAIRMAN BABCOCK: Well, okay. Now, you  
10 know, I don't have any doubt that if the judge felt  
11 pressure enough by these guidelines and couldn't stop it,  
12 that would be on TV gavel-to-gavel right now, and you-all  
13 know what it's about. Do you really think that's a good  
14 thing? That's really the call we've got to make, and I  
15 come down on the side -- and it may be this is the way  
16 we're going, we can't stop it. I come down on the side  
17 that it's not a good thing.

18 CHAIRMAN BABCOCK: Frank, whose interest are  
19 you protecting in the Andrea Yates case if you keep  
20 gavel-to-gavel coverage out?

21 MR. GILSTRAP: I think you're kind of  
22 protecting the interest of society. I mean, I really  
23 don't think it's a good thing, and maybe that's  
24 patronizing, maybe that's a terrible thing to say, but we  
25 all know there are good things. There are things that

1 shouldn't be on TV. We see them all the time, and I don't  
2 think -- I don't think a gavel-to-gavel coverage of that  
3 kind of trial being shown on TV -- I mean, it will wind up  
4 -- Chip, it will be on Entertainment Tonight. I promise  
5 you. It's on there now.

6                   CHAIRMAN BABCOCK: Well, yeah, that's the  
7 point. It's on there now. What you're talking about is  
8 restricting a particular method of reporting on the trial,  
9 because the trial is going to get reported on. I mean,  
10 there are three sketch artists in there, and, you know,  
11 there are print reporters. What you're doing is you're  
12 taking the most accurate method of reporting of the trial  
13 and saying you can't do that, because everything else is,  
14 you know, court -- you know, these reporters are writing  
15 down testimony and snippets, and they're reporting, and  
16 they go out on the street and they say, "Here's what  
17 happened," but you don't have the most accurate depiction  
18 of what happened.

19                   MR. GILSTRAP: I disagree that that's the  
20 most accurate.

21                   MS. McNAMARA: In the case of a very  
22 unpopular criminal defendant --

23                   CHAIRMAN BABCOCK: Right.

24                   MS. McNAMARA: -- I think we're protecting  
25 the interests of that defendant against --



1 CHAIRMAN BABCOCK: By keeping the cameras  
2 out?

3 MR. ORSINGER: But to a fair trial, not to  
4 privacy.

5 MS. McNAMARA: Right, not to privacy, but to  
6 a fair trial because the public interest and the circus  
7 environment that can be created may cause the judge to  
8 behave differently; and in that situation where you've got  
9 a defendant that nobody likes, you have some of the lynch  
10 mob mentality, you know, our system says that person gets  
11 a fair trial.

12 CHAIRMAN BABCOCK: How about the terrorist  
13 that's being tried in the Eastern District of Virginia?

14 MS. McNAMARA: Same thing.

15 CHAIRMAN BABCOCK: Yeah. He asked for  
16 cameras.

17 MS. McNAMARA: Maybe so, but --

18 MS. EADS: Yeah, but he --

19 CHAIRMAN BABCOCK: So did Andrea Yates, by  
20 the way.

21 HONORABLE SARAH DUNCAN: And I think that's  
22 the point.

23 MR. GILSTRAP: Would it be a good thing to  
24 have that on TV, the terrorist trial? You want that on TV  
25 right now?

1 MS. SWEENEY: No.

2 CHAIRMAN BABCOCK: Oh, I think it would be a  
3 great thing.

4 MR. ORSINGER: I think putting the Yates  
5 trial on TV would do a lot of good, because they're  
6 spending two weeks talking about the effects of  
7 depression, and if the United States of America could  
8 learn something about the effects of depression then you  
9 wouldn't have other mothers killing their children.

10 MR. GILSTRAP: You can have a Jerry Springer  
11 program on depression and learn just as much, Richard.

12 CHAIRMAN BABCOCK: Well, that's depressing  
13 to think in and of itself, but, see, I disagree with Judge  
14 Patterson that our courts are fragile. I think our courts  
15 are very resilient, and I think that we -- and I am proud  
16 of what happens in our courts, even when there are bad  
17 lawyers and even when it's a slip-and-fall and nobody is  
18 paying much attention. I think it would be a great thing  
19 for the world to see that terrorist trial. I really do,  
20 because they would see that we have procedures in place  
21 that are fair and honest and this guy is going to get a  
22 fair shake in the courtroom, and I think it would be  
23 terrific to show the world.

24 MR. GILSTRAP: You think they would draw  
25 that conclusion?

1 MS. SWEENEY: Why give him exactly what he  
2 wants, which is a public forum?

3 CHAIRMAN BABCOCK: Well, they are going to  
4 have a better record to draw the conclusion on than having  
5 the Reuters in there, you know, writing an article about  
6 it. I think. Judge Peeples. You haven't said anything.

7 HONORABLE DAVID PEEPLES: A couple of  
8 points. I think I'm right. The issue that ultimately we  
9 have to decide is whether to stick with 18c, which if  
10 litigants and witnesses know their rights under 18c, it  
11 seems to me that in a civil case they can stop --

12 MR. ORSINGER: Sure.

13 HONORABLE DAVID PEEPLES: -- the cameras if  
14 they assert their rights.

15 CHAIRMAN BABCOCK: Not in most counties,  
16 Judge. Not in your local county.

17 HONORABLE DAVID PEEPLES: But if a local  
18 rule approved by the Supreme Court has made inroads on  
19 this, maybe not, but I think you've got a strong case  
20 under 18c that -- I mean, what we're talking about is  
21 opening up 18c, I think, and giving trial courts complete  
22 discretion or great discretion where it's pretty limited  
23 under 18c unless there's a wide local rule.

24 CHAIRMAN BABCOCK: Judge, in your county,  
25 you've got local rules in Bexar County, and so a witness

1 cannot --

2 HONORABLE DAVID PEEPLES: I don't think  
3 we've got one on -- that qualifies 18c.

4 CHAIRMAN BABCOCK: Yes, you do.

5 HONORABLE DAVID PEEPLES: The criminal  
6 courts may. The civil courts --

7 CHAIRMAN BABCOCK: Yes, you do.

8 HONORABLE DAVID PEEPLES: Do we? I'd like  
9 to see it.

10 CHAIRMAN BABCOCK: My point is no witness  
11 can stop a camera from being in a civil court in Bexar  
12 County if the judge wants to let it in.

13 MR. GILSTRAP: I think that's an important  
14 point to settle. In other words, is 18c -- can 18c trump  
15 the local rules or are there local rules out there that  
16 are trumping 18c?

17 CHAIRMAN BABCOCK: The latter.

18 MR. ORSINGER: 18c subdivision (a)  
19 specifically permits local rules to trump (b).

20 HONORABLE SARAH DUNCAN: It doesn't. It  
21 talks about guidelines promulgated by the Supreme Court.  
22 It doesn't talk about local rules.

23 CHAIRMAN BABCOCK: Well, Sarah, there are  
24 local rules in --

25 HONORABLE SARAH DUNCAN: Well, I would

1 challenge them, if I were a civil litigant and I didn't  
2 want my trial reported in television coverage, because we  
3 also have a rule that says that a local rule can't  
4 conflict with a Rule of Civil Procedure.

5 MR. GILSTRAP: I think that's a crucial  
6 point.

7 HONORABLE DAVID PEEPLES: Can I finish what  
8 I was saying?

9 CHAIRMAN BABCOCK: Yeah. I'm sorry, Judge  
10 Peeples.

11 HONORABLE DAVID PEEPLES: Rule 3a says a  
12 proposed local rule can't contradict these Rules of Civil  
13 Procedure, but there may be room for the Supreme Court to  
14 approve that local rule and thereby allow it. Okay. But  
15 I just think what we're talking about here is this rule  
16 allows the trial courts the discretion to almost  
17 completely control what happens. Okay. You can say "no"  
18 or you can say "yes" or you can say "sorry." Okay.  
19 That's point one.

20 Point two, we've been talking as though all  
21 that's at issue is total coverage gavel-to-gavel.

22 MS. SWEENEY: Yeah. That's right.

23 HONORABLE DAVID PEEPLES: And that's not  
24 right. I have had in my 20 years probably 25 TV cases,  
25 not where they did the whole thing, but hearings. It

1 might be some termination of parental rights case where  
2 there was just horrible conduct or an injunction involving  
3 some kid playing on the basketball team. You know, there  
4 are all kinds of short, you know, one hour, 30-minute,  
5 two-hour hearings short of trial where, in San Antonio at  
6 least, the news stations find out about it and they want  
7 to be there.

8                   CHAIRMAN BABCOCK: Right.

9                   HONORABLE DAVID PEEPLES: So we're talking,  
10 in my opinion, in civil cases that's by far the most  
11 common instance that's going to come up here.

12                   Okay. Another point, it's been made -- said  
13 by several people that the participants will act  
14 differently, and I think it is absolutely true that some  
15 judges will act differently when they're on the camera.  
16 Sometimes they will act better. That point has been made.  
17 They will sit up straight, and they will pay attention,  
18 and they will be thinking about what they're saying and  
19 how it's going to look, and that may be good.

20                   Let me give you an instance. Several days  
21 ago, this was a DWI case in San Antonio where a judge  
22 granted a continuance in a DWI case where the defendant  
23 had killed a couple of people, and what we saw was -- I  
24 mean, they focused in on the judge. We saw the victim's  
25 family wanting to attack the defendant, and the

1 defendant's lawyers standing there, and the family shook  
2 their fists and fingers and shouted at him, all in a  
3 courtroom, and then they focused on the poor judge up  
4 there who granted this continuance. Now, he didn't acquit  
5 the guy, he didn't give him probation. He granted a  
6 continuance on the punishment hearing. And they mentioned  
7 his name, and I will guarantee you that that judge is  
8 going to think twice about how he rules in that case in  
9 the future because his face and his name have been shown  
10 on television.

11                   Now, is that good or bad? I don't know, but  
12 we need to be aware that that is the kind of thing that is  
13 at stake in this rule. We've got issues of drafting and  
14 how does it work and so forth, but I'm just speaking to  
15 the broader issues right now.

16                   CHAIRMAN BABCOCK: Stephen.

17                   MR. YELENOSKY: Well, I think your point  
18 that it isn't always gavel-to-gavel brings in that there  
19 is an element perhaps of choosing or editing and there's a  
20 power in that --

21                   HONORABLE DAVID PEEPLES: Sure.

22                   MR. YELENOSKY: -- that draws into question  
23 whether or not that snippet is the most accurate. Was a  
24 film or a live TV camera of what you just said the most  
25 accurate depiction of this meeting today if it covered two

1 minutes of that or is the transcript? For the purposes of  
2 what a court is meaning to do, I guess I would question  
3 whether the most accurate is even gavel-to-gavel. If  
4 that's true, I imagine every trial that is covered  
5 gavel-to-gavel and then is appealed should be reviewed by  
6 the court of appeals on TV, because otherwise somebody has  
7 an argument that they're not reviewing the most accurate  
8 record of that trial, even though they have a transcript.

9           So I guess I don't want to let it lie, and I  
10 think even those who are questioning whether this is a  
11 good idea have referred to the balance between right to  
12 fair trial and right to know, and I guess I think we  
13 should question is it a right to know or, as you said  
14 Chip, a right to a particular form of knowing or media  
15 that may not be the most accurate, particularly if it's  
16 edited.

17           CHAIRMAN BABCOCK: Yeah. Just I think that  
18 this is -- I'm going to accurately state what the law is.  
19 There is a First Amendment right for the press to attend  
20 trials.

21           MR. YELENOSKY: Uh-huh.

22           CHAIRMAN BABCOCK: And that's the Richmond  
23 Newspapers case, and the state may not close the courtroom  
24 even, for example, in the case of a juvenile victim,  
25 juvenile rape victim. I mean, there is a U.S. Supreme



1 Court case on that. So you start with the proposition  
2 that the right for the press to be in a trial is of  
3 constitutional dimension.

4 MR. YELENOSKY: Sure.

5 CHAIRMAN BABCOCK: And so what we are  
6 talking now is not about whether the press has a right to  
7 be there, but what tools --

8 MR. YELENOSKY: Exactly.

9 CHAIRMAN BABCOCK: -- that they have to  
10 report on it, and when I say the most accurate depiction  
11 of what's going on, you know, obviously you could wait to  
12 get a transcript and do all those other things, but of the  
13 tools that the reporters have as among sketch artists,  
14 note pads, memory, the most accurate for them and for the  
15 public is the camera.

16 Now, does that mean that they are not going  
17 to edit it? No, that doesn't mean it anymore than the  
18 print reporter is going to, you know, fit it into an 18  
19 column, you know, 18-inch story. I mean, he's going to  
20 edit, too. That's going to happen, but in terms of the  
21 significant and dramatic testimony that occurs during the  
22 day, the most accurate depiction of that -- and, you know,  
23 I got stung by this myself in the Turner case. Wayne  
24 Dolcefino, you know, two days after he buried his mother  
25 got on the witness stand and just blew up like a

1 firecracker. That was -- you know, that image is  
2 indelibly printed on a lot of people, but that is what  
3 happened, and there is no way you could have captured that  
4 if all you had been was a sketch artist or a guy with a  
5 legal pad, just wouldn't have captured that. Linda.

6 MS. EADS: But the Supreme Court of the  
7 United States itself does not allow cameras in its  
8 courtroom for many of the reasons that have been stated in  
9 this room, which is they don't want just part of the  
10 deliberations, deliberative process, publicized. They  
11 don't want just sentences here and there and snippets on  
12 the evening news. They believe that that would distort  
13 the process that they have before them, and they also  
14 don't want it because of the effects it has on judges. I  
15 mean, that's been stated as reasons why it should not be  
16 televised.

17 CHAIRMAN BABCOCK: Yeah. I mean, you know,  
18 I don't know if they're right or wrong, but they're  
19 moving. I mean, Bush V. Gore they allowed audio recording  
20 of it. So they're going to face pressure to move on to  
21 that.

22 MR. GILSTRAP: Chip, one quick comment?

23 CHAIRMAN BABCOCK: Yeah, Frank.

24 MR. GILSTRAP: Just on Judge Peeples' -- his  
25 report of that DWI in San Antonio, and I am not saying

1 this happened at all, but I could see that scenario  
2 whereas instead of the victim's family running up and  
3 confronting the defendant, where the lawyers had them run  
4 up and confront it on TV.

5 MS. SWEENEY: Uh-huh.

6 MR. GILSTRAP: And that gets fed back to the  
7 judge. I mean, and that's not a particularly high profile  
8 trial. You know, lawyers are clever folks, and if you can  
9 affect the outcome of the case, they are going to do it.  
10 We now have lawyers that come in with incredible visual  
11 displays that weren't even thought of ten years ago.  
12 Well, now you can affect it through the media, the effect  
13 on the process, it does filter the jury if they're not  
14 sequestered. Who knows.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: Chip, there are abuses in courts,  
17 so are we just going to close the courts because there are  
18 abuses? Are we going to -- if there are going to be  
19 abuses from television, we just close it? How did we  
20 start out --

21 MR. GILSTRAP: We're not going to show it on  
22 TV.

23 MR. LOW: -- with open courts? People in  
24 this country didn't want to be tried in secret. They  
25 wanted somebody there. People could see what's going on.

1 How do the people in this country get most of their  
2 information? From television. They won't go down and  
3 watch the courts. How do they get to know the judges?  
4 Most of them never even know. They see a name and they  
5 vote, so they're not going to go down and watch. So how  
6 would they see a judge? Through a trial or something like  
7 that. So what you say is that we'll open the courts, but  
8 not very wide, and what they don't know, won't hurt them.  
9 That's not right.

10 CHAIRMAN BABCOCK: Carlyle.

11 MR. CHAPMAN: It seems to me that we have to  
12 leave room for all of the competing interests to apply  
13 because there's no question that the First Amendment right  
14 is clear and of constitutional dimension, but there also  
15 is the right to fair trial that is equally clear, and it  
16 seems to me that what we have to do is put the onus as  
17 well as the discretion on the shoulders of the judge so  
18 that the balance on a case-by-case basis is made to  
19 protect the right to fair trial and balance it against  
20 the -- a right of free press.

21 In a sensational case that may mean that  
22 there is only one camera in the court and everybody pools  
23 from that to get the information, that it's not showtime  
24 so that it becomes a spectacle, because then I think that  
25 does infringe upon the right to a fair trial. And in the

1 small case that someone is trying to make spectacular or  
2 even the situation, Frank, where someone is -- some  
3 lawyers are trying to manipulate the system, still the  
4 court has to maintain control of that courtroom, and it  
5 seems to me that it is a good thing when judges are not  
6 paying attention and not being particularly responsive to  
7 the litigants that they know that the public can see that,  
8 and it may make them more responsive to litigants and make  
9 them more in control of their courtroom, and I do think  
10 that our courts ought to be open, but not to the point of  
11 infringing upon the rights of the litigants to have a fair  
12 trial, and when it becomes a spectacle, when it's  
13 something that is for entertainment only, then it does  
14 impair, I think, the litigants' right to fair trial, and  
15 the court has to maintain control of that.

16           Well, I come down in favor of local rules  
17 that give the judges the opportunity and the  
18 responsibility on a case-by-case basis to make a  
19 determination as to what is appropriate in the particular  
20 trial setting to protect the rights of the litigants to  
21 have a fair trial. I think it's an abuse, for example, to  
22 be in Richard's situation where there's a microphone right  
23 behind you and you say to the press, "Can you hear?" and  
24 it's up to them to say whether they can or not. That's  
25 ridiculous. The lawyers ought to be able to have the

1 right to confidential communications, and that should be  
2 invalid, and they ought to make a determination about how  
3 that is preserved, but that's all part of a court  
4 exercising discretion and taking the responsibility to  
5 make sure that the litigants have a fair trial.  
6 Ultimately it rests on the judge, it seems to me.

7 CHAIRMAN BABCOCK: Skip.

8 MR. WATSON: Chip, I want to better  
9 understand what you were saying, and this is purely  
10 informational --

11 CHAIRMAN BABCOCK: Sure.

12 MR. WATSON: -- that I'm asking just to  
13 clarify. I think everybody agrees that it's a good  
14 distinction to say that we're talking about the means or  
15 the tools by which reporters use to report what's going on  
16 in a public forum, but what was unclear to me from your  
17 comments -- and that distinction was helpful for me, but  
18 what was unclear to me was, are you of the opinion that  
19 the trial judge should not have the authority on a  
20 case-by-case or even day-by-day or even witness-by-witness  
21 situation to say, "I believe that the use of these tools  
22 or means to report would adversely affect what's happening  
23 in my courtroom, would adversely affect the administration  
24 of justice"?

25 CHAIRMAN BABCOCK: No. I think that the --

1 both this rule that we have under consideration and the  
2 local rules that are in existence all over the state give  
3 discretion to the trial judge to control how those tools  
4 are used and the method of how they're used. For example,  
5 it is pretty standard that there's only going to be one  
6 video camera and one still camera so you're going to avoid  
7 the Billy Solestes situation where you've got, you know,  
8 cameramen, you know, wandering all over the courtroom --

9 MR. WATSON: Yeah, moving around.

10 CHAIRMAN BABCOCK: Yeah. And you keep them  
11 in one spot, and to me, that's -- you know, that's fine,  
12 and that's good. It's pretty standard now, it's become  
13 standard, that there is a prohibition on filming jurors in  
14 the courtroom, and I think that's within the judge's  
15 discretion, and I don't think anybody particularly argues  
16 that. So in promulgating rules for the exercise of the  
17 discretion, certainly the trial judge in the first  
18 instance has discretion to keep them out altogether and  
19 that if he does allow them into the courtroom then  
20 discretion to monitor and to regulate how they're used  
21 once they're in the courtroom.

22 MR. WATSON: But I'm trying to go a step  
23 further, and, again, I'm just trying to clarify this. To  
24 me this is truly a case-by-case basis, and it's to me even  
25 potentially a witness-by-witness situation, and I can see

1 some particularly fragile witnesses that most in this room  
2 would probably find it offensive to have that witness'  
3 testimony aired. For example, the child rape victim that  
4 we're talking about that, yes, the Supreme Court has held  
5 that the press can be in there, but that doesn't mean  
6 there's a nice, tight shot of her face or his or her face  
7 as they're testifying going out all over the airwaves; and  
8 trying to find a balance there, it seems to me that beyond  
9 local rules I would -- I think most of us would be a  
10 little more comfortable if there were a way that we could  
11 say that the individual judge still has the power beyond  
12 the local rule to say, "You can have this witness but not  
13 this witness," and that's what I'm trying to get at. Is  
14 there common ground there or is there not?

15                   CHAIRMAN BABCOCK: I think there is, but I  
16 think the thing you have to be careful about is you can't  
17 write a rule that gives the judge discretion to start  
18 regulating the coverage on the basis of content. For  
19 example, it would be impermissible, I think, for the judge  
20 to say, "Okay, this is a case that is attacking or  
21 challenging government action, and so any witness that is  
22 going to be critical of the governor, we're just not going  
23 to have. We're not going to see that."

24                   MR. WATSON: Or a case that -- or a  
25 situation where they're going to be challenging my ruling,



1 and you're not going to be able to show that.

2 CHAIRMAN BABCOCK: Right.

3 MR. WATSON: I understand that.

4 CHAIRMAN BABCOCK: That would be a  
5 content-based regulation, and that would be impermissible,  
6 but certainly there is common ground, if there are two  
7 sides that need to get together, there is certainly common  
8 ground in terms of giving the judge discretion to regulate  
9 the use of this tool, because Linda's point is well-taken,  
10 and I don't deny for a minute we've got to recognize that  
11 the television camera is a hugely powerful tool in ways  
12 that the ink and pen are not. I mean, that's just the  
13 truth, and so that's why we're having this whole debate.  
14 If it wasn't such a powerful medium then nobody would  
15 care, but it is a powerful medium, and we have to take  
16 that into account, and that's why we're having this  
17 discussion.

18 MS. McNAMARA: Chip, just mindful of the  
19 time, I don't know when we go 'til, whether it's noon or  
20 12:30, but --

21 CHAIRMAN BABCOCK: We're going 'til 3:00  
22 today.

23 MS. McNAMARA: Is there an issue up for  
24 vote?

25 CHAIRMAN BABCOCK: Yeah, I was -- at some

1 point I -- I find the debate interesting, so I --

2 MS. McNAMARA: It's an interesting  
3 discussion.

4 CHAIRMAN BABCOCK: There's nothing to --

5 MR. ORSINGER: Well, we only have half a  
6 committee here, and this is a pretty important step, and  
7 especially if people are going to be bound by votes that  
8 are seven years old, I think we ought to be more careful  
9 when we're going to take a vote.

10 CHAIRMAN BABCOCK: Oh, we're not bound by a  
11 seven year old vote because there's a new charge from the  
12 Court, so -- but that's a good question and probably a  
13 good time to ask it. And, Osler, I don't know if this is  
14 directed to you or Justice Hecht, but do you want us to  
15 comment on the specifics of this rule or do you want us,  
16 this group or a larger group back in May, to say we think  
17 statewide rules are a good idea, bad idea? What do you  
18 want from us? Zaga?

19 JUSTICE HECHT: Well, as usual I think we  
20 will probably want both. I think we would like the  
21 committee's advice on whether we ought to have any rule at  
22 all, apropos our discussion yesterday and on many other  
23 occasions, and then assuming we're going to have a rule,  
24 what should it -- what should it look like? Are there  
25 particular problems with this one?

1 MR. LOW: Chip, it looks like --

2 JUSTICE HECHT: But it may -- whether we do  
3 it in May or not, I don't have -- I don't think it's  
4 urgent.

5 CHAIRMAN BABCOCK: Yeah, Buddy.

6 MR. LOW: I mean, the present rule says the  
7 judge may allow television. That seems to be the dispute  
8 we're all talking about, really, is television. The  
9 present rule says that. The rule we have here says "may  
10 be granted." The difference is that this rule does  
11 require some motion, some showing, or something like that;  
12 and the question I raise is whether or not this should be  
13 a suggestion by the Supreme Court to supersede local  
14 rules, because it doesn't change the substance that the  
15 judge may grant it; and Frank was right when we started,  
16 do we go to where we try to suggest that they shall have  
17 coverage unless or do we say they may grant it?

18 And I don't think either one of these goes  
19 to that extent, so it looks like to me the issue is  
20 whether or not we want to stick with 18c but have some  
21 more detailed suggestions for the Court to supersede local  
22 rules where you have applications and people know about it  
23 and notice or just let the local rules stay as they are.

24 JUSTICE HECHT: On this local rules, as I  
25 recall, we decided -- and I'm a little vague on this, but

1 I think we decided years ago that we would basically just  
2 approve any rule within reason that the local judges  
3 wanted to use on the theory that we'll see which -- we'll  
4 see if there are any problems as time passes and whether  
5 one works better than another or one was a terrible  
6 mistake or whatever and without trying to predict that  
7 this will be a good rule for the entire state or not,  
8 because there are -- you know, Texas is a big state, and  
9 maybe you talked about this before I got here, but the  
10 impact of broadcasting cases is far different in Palestine  
11 or Beaumont than it is Dallas or Houston or El Paso or  
12 Midland or Amarillo. It's just going to be different  
13 depending on the demographics and the interest there.

14           So that's why we did it, but we always  
15 thought at some point we would get enough evidence from  
16 the use of the local rules in various locations to put  
17 together a rule that we could use statewide.

18           CHAIRMAN BABCOCK: Yeah. I'm a little  
19 vague, too, but my recollection is that you did not  
20 disapprove any rule, although, I think you made  
21 modifications to them, maybe Williamson County or one of  
22 the counties you changed a little bit.

23           JUSTICE HECHT: We might have.

24           CHAIRMAN BABCOCK: That's my recollection.

25           MS. SWEENEY: As of right now how many

1 trials does this come up in in Texas? Do we have some  
2 kind of an -- is it, you know, ten a year or a thousand a  
3 year?

4 CHAIRMAN BABCOCK: Yeah. I don't know. I  
5 may be the most knowledgeable person because I represent  
6 Court TV and usually hear about it when they are having  
7 any problems getting into a courtroom, and as I said  
8 earlier, most of the action is on the criminal side. I  
9 bet you since we've had local rules I think I am not wrong  
10 to say there probably haven't been 20 civil cases, 20  
11 trials. Now, Judge Peeples is right that a lot of times  
12 hearings will attract.

13 HONORABLE DAVID PEEPLES: On the evening  
14 news.

15 CHAIRMAN BABCOCK: Huh?

16 HONORABLE DAVID PEEPLES: They're on the  
17 evening news.

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE DAVID PEEPLES: In San Antonio  
20 when things are more dull on the criminal side they seem  
21 to be more interesting on the civil side.

22 MR. YELENOSKY: That's a coincidence.

23 HONORABLE DAVID PEEPLES: Yeah.

24 CHAIRMAN BABCOCK: But in, I don't know, 10  
25 or 12 years I bet you we've had less than 25 civil trials

1 done in the state. I can find out.

2 HONORABLE DAVID PEEPLES: Gavel-to-gavel?

3 CHAIRMAN BABCOCK: Gavel-to-gavel. That's  
4 my hunch.

5 MR. GILSTRAP: Where I think we are is this:  
6 First of all, we're not sure about the efficacy of the  
7 local rules. When you read the rule book it seems to be  
8 that the local rules can't trump the judge's decision. He  
9 may or may not, and he has the absolute discretion; and  
10 that's what the rule book seems to say, but maybe the  
11 local rules somehow trump that. That's the first thing.

12 Once we decide that, then it seems to me the  
13 question is this: The current rule tilts away from  
14 coverage. This proposal tilts toward coverage, and do we  
15 want to tilt? I mean, and once we learn which way we tilt  
16 then we can write a rule.

17 JUSTICE HECHT: Just on that, of course, if  
18 a local rule canons a judge's discretion it's only because  
19 the judge voted for the local rule. We don't have -- as  
20 far as I know, we have no local rules in Texas that all of  
21 the local judges didn't agree to. We don't have any -- we  
22 don't let them adopt local rules by a 10 to 3 vote.  
23 They've either got to go back and settle it, and the last  
24 problem we had was in Nueces County where the county  
25 judges wanted one set of rules and the district judges

1 wanted another set, and we made them all go sit in the  
2 same room until they got it resolved, which was I think  
3 about 20 days or something like that. It took a while.

4 MR. EDWARDS: Had EMS standing by, too.

5 JUSTICE HECHT: But I don't recall any  
6 cases -- I don't know if anybody else does -- where  
7 this -- where broadcasting has been a point of complaint  
8 in the Texas system. That doesn't necessarily say  
9 anything.

10 CHAIRMAN BABCOCK: I am not aware, and I am  
11 aware that there have been motions -- in fact, I have  
12 presented some to civil courts that have been granted, but  
13 I also can think of one or maybe two situations where they  
14 were denied. In other words, coverage was denied, and  
15 that was the end of it.

16 MR. GILSTRAP: Well, let me say this. The  
17 local rule -- 18c says that the judge may permit it only  
18 in the following circumstances, and (b), "when the parties  
19 agree and the witness consents." I mean, that's what --  
20 and, as I understand, they can't change that in Harris  
21 County; and so if a witness stands up and says, "I don't  
22 want to be filmed," it doesn't make any difference what  
23 the Harris County rule says. That's the way I read it.  
24 If that's not the situation, we need to know.

25 CHAIRMAN BABCOCK: That isn't the situation.

1 MS. CORTELL: There's an "or" in the rule,  
2 so that if it's in accordance with guidelines then you  
3 don't have to reach (b). So I'm not sure we're  
4 changing --

5 MR. GILSTRAP: Okay. Yeah.

6 MS. CORTELL: We're just standardizing  
7 throughout the state, and if these rules are in accordance  
8 with current local rules, and that I don't know, then I  
9 don't know that it's as big a change as we're thinking it  
10 might be.

11 CHAIRMAN BABCOCK: That was the point I was  
12 trying to make earlier, that this -- what we're looking at  
13 here is not all that different --

14 MS. CORTELL: Right.

15 CHAIRMAN BABCOCK: -- than what the local  
16 rules that are in effect in all the major counties and  
17 some of the smaller counties.

18 MR. GILSTRAP: I think you're right, Nina.  
19 The "or" is the key. The guidelines can trump it.

20 CHAIRMAN BABCOCK: Yeah, well, that's my  
21 point, Frank. If it was (b), you'd never get a case --  
22 you'd never get a camera in there.

23 Sarah. Stephen, will you yield to Justice  
24 Duncan?

25 MR. YELENOSKY: I will yield.



1 HONORABLE SARAH DUNCAN: Where are the  
2 guidelines? Nobody has talked about Supreme Court  
3 guidelines today under (a).

4 MR. ORSINGER: There are only local rules  
5 that the Supreme Court has approved.

6 HONORABLE SARAH DUNCAN: Is there a  
7 distinction between Supreme Court guidelines and local  
8 rules?

9 JUSTICE HECHT: Well, we've just approved  
10 the guidelines on an ad hoc locale basis.

11 CHAIRMAN BABCOCK: There is an order from  
12 the Court attaching a set of rules that says, "These are  
13 approved."

14 JUSTICE HECHT: I think when we first wrote  
15 this rule we thought, "Well, we don't know exactly.  
16 Things might change. We might put something out, and it  
17 might not work very well, and then we wouldn't want to go  
18 through the rule-making process to change it, so let's  
19 have a lot of flexibility here"; but then I think, as I  
20 recall, we got even less sure that we wanted to pronounce  
21 from on high a statewide rule until a lot of judges around  
22 the state had had enough experience that they thought this  
23 would work or this wouldn't work.

24 CHAIRMAN BABCOCK: Yeah. And correctly --

25 HONORABLE SARAH DUNCAN: So we're pretty

1 much ignoring the rule.

2 JUSTICE HECHT: No. I mean, the guidelines  
3 were just -- we just let the local judges in Dallas County  
4 submit a set of guidelines and say, "We will use those in  
5 Dallas and see if they work."

6 MR. GILSTRAP: The Supreme Court has  
7 approved local guidelines, in effect.

8 CHAIRMAN BABCOCK: Right.

9 JUSTICE HECHT: But it's place-by-place  
10 because there is just too much -- we were fearful there  
11 was too much diversity. Now, whether that -- I'm not  
12 aware if it's proved to be a problem, but just because  
13 nobody screamed.

14 MR. GILSTRAP: So the question is have we  
15 reached the point where, having allowed these local  
16 jurisdictions to experiment, is the Court ready to  
17 promulgate a, you know, statewide set of guidelines?

18 JUSTICE HECHT: Yeah.

19 MR. GILSTRAP: Is that where we are, you  
20 think?

21 JUSTICE HECHT: Yeah.

22 CHAIRMAN BABCOCK: And before you got here,  
23 Justice Hecht, Anne McNamara pointed out correctly that  
24 some years ago -- she thought three, and I know it's  
25 longer than that, it's maybe six or seven -- we had a

1 meeting here about whether we were going to have a  
2 statewide rule --

3 JUSTICE HECHT: Right.

4 CHAIRMAN BABCOCK: -- and that was defeated,  
5 in my recollection fairly decisively, but it was a  
6 Saturday morning, and it was like a thirteen-five vote or  
7 something like that. Stephen.

8 MR. YELENOSKY: Actually, I had a question,  
9 and I apologize I wasn't listening more closely. I think  
10 you answered it earlier. The state of the law, the  
11 constitutional analysis of this question as far as U.S.  
12 Supreme Court, and if you have an opinion about whether  
13 something is percolating up because everybody is talking  
14 about whether we tilt one way or the other, and I think I  
15 need to back up and -- because if I'm convinced that there  
16 is no constitutional right to electronic media coverage  
17 and it's clearly just a policy question, if there either  
18 is or may be soon then you not only need to tilt towards  
19 encouraging it, but you couldn't leave it as unfettered  
20 discretion of the judge either, because it would have to  
21 be subject to review. So what did you say earlier, or can  
22 you elaborate on what the law is?

23 CHAIRMAN BABCOCK: Yeah. There is a clear  
24 well-articulated right for the press --

25 MR. YELENOSKY: Right.

1                   CHAIRMAN BABCOCK:  And the public, but for  
2 the press to attend trials.

3                   MR. YELENOSKY:  Right.

4                   CHAIRMAN BABCOCK:  There is no  
5 constitutional right that I'm aware of that has ever been  
6 recognized for the press to carry with them into a trial a  
7 camera, and I know that the argument has been made from  
8 time to time that to deprive the press of an important  
9 tool like a camera deprives them of a constitutional  
10 right, but I am not aware of any court that has so held.

11                   MR. YELENOSKY:  And there's nothing in the  
12 appellate courts that you're aware of going up on that?

13                   CHAIRMAN BABCOCK:  There may be, but I --  
14 you know, and there may be a stray case out there  
15 somewhere, but it's certainly not of the dignity of a  
16 state Supreme Court or the U.S. Supreme Court as far as I  
17 know.

18                   HONORABLE SARAH DUNCAN:  That was the basis,  
19 as I understand it, for Moussaoui's challenge of the  
20 Federal rule in his case, and he made a constitutional  
21 challenge to the Federal rule, and the trial judge denied  
22 that.

23                   MR. WATSON:  Who did?

24                   HONORABLE SARAH DUNCAN:  Zacarias Moussaoui,  
25 the guy that's being tried in --

1                   CHAIRMAN BABCOCK: The alleged terrorist  
2 that's being tried in Federal court in Virginia. Just as  
3 an aside, as a point of interest, in case anybody's  
4 interested, Andrea Yates had -- I thought her lawyer had a  
5 very interesting spin on this. He petitioned on her  
6 behalf to have cameras cover gavel-to-gavel the trial; and  
7 his spin was, "Look, you, Judge, have entered a very  
8 strict gag order, and you're not allowing me to talk to  
9 the press at all, and there has been what I think is a  
10 violation of the gag order because I saw the Sunday before  
11 trial the district attorney on 60 Minutes talking about my  
12 case. And so now you are depriving my client of a fair  
13 trial by not having the most accurate tool in the  
14 courtroom to report on what's going on since you've  
15 restricted my right to say anything about it, you've  
16 allowed the D.A. to get on TV, and now you're not allowing  
17 the most accurate tool to do gavel-to-gavel coverage."  
18 That's his argument.

19                   MR. GILSTRAP: What you're talking about,  
20 Chip, what we're talking about now, are possible First  
21 Amendment arguments that can be made or have been made.

22                   CHAIRMAN BABCOCK: Well, that's a Sixth  
23 Amendment argument he's making.

24                   MR. GILSTRAP: Okay. All right. And then  
25 in addition we have your rather insidious First Amendment

1 argument that once the camera goes -- once the camera goes  
2 in you have a First Amendment issue on content, and so,  
3 you know, "I've decided we're not actually going to allow  
4 any testimony about the actual details of the child rape,  
5 but we are going to have the other stuff." Well, that is  
6 content-based. Now, there's some type of reasonable  
7 balancing test there, but, you know, the camel's got his  
8 nose under the tent at that point, once you let the camera  
9 in. I mean, I think that's where we're going.

10 CHAIRMAN BABCOCK: Well, you can't restrict  
11 the press from covering the content anymore than you can  
12 restrict the print reporter from covering the details.

13 MR. GILSTRAP: I'm talking about showing it,  
14 showing the content.

15 CHAIRMAN BABCOCK: Yeah. Yeah, Sarah.

16 HONORABLE SARAH DUNCAN: I would just like  
17 to make a couple of points.

18 CHAIRMAN BABCOCK: And you can close this  
19 debate, because we're out of time.

20 HONORABLE SARAH DUNCAN: Oh, goody. One is  
21 I don't -- I think we're all being somewhat idealistic in  
22 assuming that what everybody wants who wants cameras in  
23 the courtroom is a fair trial. I don't think that's true,  
24 and I think if you look at the people, some of them who  
25 have pressed the hardest to get cameras in the courtroom,

1 it's pretty clear that what they are actually seeking is  
2 not a fair trial. They are actually seeking an outside  
3 influence be brought to bear on the trial process in their  
4 favor.

5 I also think -- I agree with Judge  
6 Patterson's statement that our courts are fragile. One of  
7 the more interesting comments I heard, you know, in the  
8 last six months was a discussion about military trials;  
9 and one of the commentators was arguing that because there  
10 is a Federal act that permits a summary of the classified  
11 information to be presented as evidence to protect the  
12 sources, that we didn't need a military trial because we  
13 had this wonderful Federal act that would get the same  
14 evidence in but protect the sources; and the person with  
15 whom he was arguing happened to be the lawyer who had been  
16 in the Department of Justice who was in charge of the  
17 terrorist task force; and she said, "You know, the problem  
18 with your analysis is that you don't know how many cases  
19 we didn't prosecute because we were so concerned about our  
20 sources and their safety and the classification."

21 I think the same analysis is true when we  
22 look at the cameras in the courtroom problem. I don't  
23 think there's ever going to be a study that demonstrates  
24 to anybody's satisfaction that witness testimony is  
25 changed or is not changed and that trial judge rulings or

1 appellate judge rulings have changed or not changed  
2 because of cameras in the courtroom. For my own  
3 experience I'll tell you that the one time that I at least  
4 knew that I was being taped it clearly affected my -- the  
5 way I did my work during that oral argument, and I don't  
6 think it affected it for the better, in my opinion. Now,  
7 the litigants may feel differently.

8 I think our courts are fragile, and I think  
9 we are fragile. We are not all supermen like Chip, who,  
10 you know, this doesn't affect us.

11 MS. EADS: For the record, Chip.

12 MR. GRIESEL: Could we vote that in the  
13 record, Chip?

14 MR. YELENOSKY: We voted that seven years  
15 ago. We can reconsider it now.

16 HONORABLE SARAH DUNCAN: I think about the  
17 witnesses in criminal trials, and perhaps in civil cases  
18 as well, who are legitimately and seriously concerned for  
19 their own safety.

20 MS. EADS: Absolutely.

21 HONORABLE SARAH DUNCAN: My concern is not  
22 so much that they're going to get on the stand and change  
23 their testimony. My concern is they're going to go to  
24 Mexico and they're never going to get on the stand, and  
25 that can happen in civil cases as well as in criminal. So



1 my feeling is that if we're going to have a statewide  
2 rule, it needs to be tilted against coverage, and there  
3 needs to be huge controls, and I don't -- I don't trust  
4 every single trial judge and appellate judge in this state  
5 to make those kinds of calls totally without regard to  
6 their own self-interest, is my concern.

7 CHAIRMAN BABCOCK: Okay. That's the last  
8 word maybe, except Osler.

9 MR. LOW: Could we have a vote on -- am I  
10 wrong, there are three things? One is to leave 18c alone  
11 and let local rules take care. That's the way we have it  
12 now.

13 CHAIRMAN BABCOCK: Right.

14 MR. LOW: Two is to leave 18c alone but have  
15 proposed proceedings, Supreme Court proceedings, be  
16 statewide that they recommend in lieu of local rules.

17 CHAIRMAN BABCOCK: Right.

18 MR. LOW: Or three would be whether we can  
19 18c and adopt something like this as rule, put it in the  
20 rule. Now, is there another vote? Is there another issue  
21 before us? If there's not, we ought to vote on that.

22 CHAIRMAN BABCOCK: Anybody got an appetite  
23 for a vote before we leave?

24 MR. CHAPMAN: I don't think we have enough  
25 information to vote. I mean, what's not before us are

1 these local rules. We haven't even had a chance to see  
2 what the local rules provide, and we're talking about  
3 changing something that we haven't seen. I see the  
4 proposed rule, but I sure would like to be able to compare  
5 it to what is existing.

6 CHAIRMAN BABCOCK: Well, we certainly could  
7 take a vote on whether or not the status quo is preferable  
8 to anything else, if you want to do that.

9 MR. CHAPMAN: Well, my point is that only by  
10 anecdotal comment do I know what the status quo is because  
11 there are a number of local rules that I haven't seen.  
12 They are not before me.

13 CHAIRMAN BABCOCK: Yeah. Good point.

14 MR. YELENOSKY: But they could change  
15 anyway, so what you would be voting for is to allow  
16 whatever they are now and the discretion to make them  
17 different.

18 MR. GILSTRAP: Why don't we vote sometime at  
19 9:00 a.m.?

20 CHAIRMAN BABCOCK: Can we defer a vote,  
21 Buddy, until we've got more people?

22 MR. LOW: That's fine. I'm just trying to  
23 bring it to a conclusion.

24 CHAIRMAN BABCOCK: Okay. Osler, you want to  
25 say the last word?

1                   MR. McCARTHY: And I think that this  
2 would -- I mean, a comparison would address it. Your  
3 experience, Chip, in litigating some of this, the local  
4 rules by and large are operating, as Chip said, in the  
5 larger counties. There was a feeling in the committee  
6 that you've got, in fact, two judges who were part of the  
7 committee process, Midland, and Penny Pope in Galveston  
8 County, JP in Galveston County, had encountered Court TV  
9 requests come in and do something and basically in  
10 those -- from that anecdotal evidence you had a feeling in  
11 the committee that the metropolitan areas were pretty much  
12 taken care of, and we tried to model -- tried to put  
13 together the best of what the metropolitan counties had;  
14 but out in Fort Stockton when Court TV showed up for  
15 something, some great big case, that that judge is lost;  
16 and it happens at the JP level as well as the district  
17 court level that that judge may be lost without any way to  
18 ferret through nothing more than 18c; and so the committee  
19 was mindful that the metropolitan counties were pretty  
20 much taken care of.

21                   MR. CHAPMAN: You're not voting, right,  
22 Chip?

23                   CHAIRMAN BABCOCK: Not voting, Carl. See  
24 you, Carlyle. We are in recess.

25                   (Meeting adjourned at 11:55 a.m.)

1 \* \* \* \* \*

2 CERTIFICATION OF THE MEETING OF  
3 THE SUPREME COURT ADVISORY COMMITTEE

4 \* \* \* \* \*

5  
6  
7 I, D'LOIS L. JONES, Certified Shorthand  
8 Reporter, State of Texas, hereby certify that I reported  
9 the above meeting of the Supreme Court Advisory Committee  
10 on the 9th day of March, 2002, Morning Session, and the  
11 same was thereafter reduced to computer transcription by  
12 me.

13 I further certify that the costs for my  
14 services in the matter are \$ 1,027.50 .

15 Charged to: Jackson Walker, L.L.P.

16 Given under my hand and seal of office on  
17 this the 20th day of March, 2002.

18

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