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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 4, 2008

(FRIDAY SESSION)

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[COPY]

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 4th
day of April, 2008, between the hours of 9:08 a.m. and
3:43 p.m., at the Texas Association of Broadcasters, 502
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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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Documents referenced in this session

08-1	226a, 4-1-08 memo from Judge Christopher
08-2	Note-taking background
08-3	Plain language draft dated October 11, 2007
08-4	Letter from J. Morriss 11-13-08 & reply from Justice Hecht
08-5	Memo from Professor Hoffman dated 3-26-08
08-6	Gruber case

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2 CHAIRMAN BABCOCK: All right, guys, we've
3 waited long enough. Everybody that's here needs to get
4 engaged. Welcome to our April 4th, 2008, meeting, and
5 Justice Hecht as usual will give us a status report from
6 the Court. Justice Hecht.

7 HONORABLE NATHAN HECHT: Well, first of all,
8 on a personal note, I understand Ralph Duggins has been
9 appointed to the Texas Parks and Wildlife Commission.

10 (Applause)

11 HONORABLE NATHAN HECHT: Any problems with
12 the game wardens take up with Ralph; and on a sadder note,
13 I got an e-mail that Carl Hamilton had had a stroke, and I
14 hope he's doing okay, so you-all need to think about Carl.

15 Justice Gaultney authored an opinion for the
16 Supreme Court about a month or two ago, sitting by
17 designation, Judge Christopher sitting by designation in a
18 case, Justice Pemberton, so the way to get on our Court is
19 to serve on the rules committee, so that's good.

20 Then to business, we have appointed a
21 committee to look at the ancillary rules, and Professor
22 Carlson is going to chair that task force, and there are
23 quite a number of practitioners and scholars in that area
24 of the law that are going to be working on trying to
25 revise as much as they think needs to be done the section

1 of the civil rules on ancillary proceedings, which you may
2 recall came up in some discussions about service of
3 process, and as we looked at those we decided that they
4 just needed to be overhauled. So we hope to have a report
5 from Elaine in the fall, and that will be a fairly
6 significant revamping of the -- of that section of the
7 civil rules.

8 Then I wanted to mention that Alistair
9 Dawson has sent us an e-mail asking that some attention be
10 given to whether Rule 11 agreements can be signed or made
11 official electronically and whether service can be made
12 electronically, and we discussed these issues to some
13 extent in connection with the electronic filing rules, and
14 we're going to -- rather than refer those to the
15 committee, we're going to continue to look at those rules
16 in connection with electronic filing, which is going very
17 well. It's in 28 counties; is that right?

18 MR. HUGHES: I think 30.

19 HONORABLE NATHAN HECHT: 30 counties, and
20 with about 80 percent?

21 MR. HUGHES: About two-thirds of the state's
22 population.

23 HONORABLE NATHAN HECHT: Two-thirds of the
24 state's population, so we're coming to the point where it
25 makes some sense to move the electronic filing procedures

1 into the civil rules and maybe make it mandatory, and
2 we'll just -- with some exceptions for some areas perhaps;
3 but anyway, that's sort of moving along; and at the same
4 time there is a project ongoing to provide for electronic
5 filing in the appellate courts, which may be still a
6 little ways off, but progress is being made.

7 And finally, we put out the proposed changes
8 to the Rules of Appellate Procedure, and initial reactions
9 were positive, and the comment period ends June --

10 MR. HUGHES: 30th.

11 HONORABLE NATHAN HECHT: June 30th, so we
12 have only received a couple of comments so far. Most of
13 them are fairly technical, but we thought we would as a
14 first item of business this morning see if there are any
15 comments from this committee on the proposed appellate
16 rules. We did change the oral argument recommendation
17 quite a bit from what the committee suggested, and that
18 was in discussions with the Council of Chief Justices who
19 felt like we should make those changes, so we'll continue
20 to monitor that to make sure that problems are being
21 addressed, but it seemed that was the best thing to do for
22 now, but there were a few other changes that the Court
23 made in the recommendations, and so if there were
24 reactions or comments, of course, we would entertain those
25 from the committee.

1 CHAIRMAN BABCOCK: Did the chiefs have any
2 response to the statistics that showed that very few oral
3 arguments were happening in some districts?

4 HONORABLE NATHAN HECHT: Yes. I mean, the
5 chiefs were concerned about that, and they think that
6 the -- their respective courts have gotten the message and
7 there will be change. Change, that's the thing.

8 CHAIRMAN BABCOCK: Change is in the air.

9 HONORABLE NATHAN HECHT: Change. And hope,
10 there's hope for change, and so we -- but they took it
11 very -- you know, they took the point, and, of course,
12 they're just one vote on their courts, but they're a
13 representative vote, and so it seemed to me that we're
14 moving in the right direction.

15 CHAIRMAN BABCOCK: Great. Anybody have any
16 comments to the TRAP rules that were published or anybody
17 pick up any undercurrent? Buddy? No? Not that a thing.

18 MR. LOW: Nope.

19 CHAIRMAN BABCOCK: I know there was some
20 interest in who Sarah Duncan's press agent was because of
21 the full length picture of her in the *Texas Lawyer*, but
22 probably not a substantive comment there. Anybody else?

23 HONORABLE NATHAN HECHT: Pam.

24 CHAIRMAN BABCOCK: Pam.

25 MS. BARON: Well, I just read through them.

1 I thought they were very elegant and very helpful to make
2 things a little simpler and easier.

3 CHAIRMAN BABCOCK: Okay. Great.

4 MR. WATSON: That's what I've heard, too. I
5 mean, I've heard nothing but positive feedback.

6 CHAIRMAN BABCOCK: Very good.

7 HONORABLE NATHAN HECHT: Great.

8 CHAIRMAN BABCOCK: All right. Anybody else
9 on the TRAP rules? Okay. Neither our cover girl --

10 HONORABLE NATHAN HECHT: Oh, I'll mention
11 one other thing.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE NATHAN HECHT: Jody points out to
14 me that we also proposed at the same time Rule 15 of the
15 Rules of Judicial Administration regarding the choice of
16 law, application of law in cases that are transferred from
17 one court of appeals district to another, so it's out
18 there, too, but it was also approved by the Council of
19 Chiefs, and we have not gotten any negative comments about
20 it either.

21 CHAIRMAN BABCOCK: Okay. Professor Dorsaneo
22 and Sarah Duncan are not here, so we'll skip that item for
23 the moment and go to the proposed PJC amendment to Rule
24 226, which Professor Albright and Judge Christopher have.

25 HONORABLE TRACY CHRISTOPHER: Alex, you want

1 me to do it or you do it?

2 PROFESSOR ALBRIGHT: I was counting on you
3 to do it.

4 HONORABLE TRACY CHRISTOPHER: Okay. Okay.
5 I sent a memo out dated April 1st, 2008. I think it's
6 over on the table if you don't have a copy of it, which is
7 probably all you need for our discussion this morning. If
8 you'll remember, the Pattern Jury Charge Oversight
9 Committee had done some research on pattern jury charges
10 and found out a lack of juror comprehension to a lot of
11 the terms that we were using, and so we started to try to
12 make our instructions to our jury a little more
13 understandable.

14 We started with Rule 226a because that's
15 something that can be approved by the Supreme Court and
16 versus the actual jury charges itself. We're trying with
17 the jury charges but encountering a lot of resistance
18 there in terms of making any sort of plain language
19 changes, so we might have to wait for the Supreme Court to
20 actually tell us to do that.

21 If you'll remember, we discussed the draft
22 on our last meeting, which was in October, and I'm --
23 unfortunately I wasn't there, but I've read it over
24 several times and sensed the distinct resistance to making
25 any changes to 226a from the committee, so I asked the

1 Supreme Court whether they still wanted us to continue to
2 work on it, and they said they did, so we're back.

3 What took place at the last meeting, just
4 kind of a little summary since it's been a while, this
5 committee recommended that we rework the section on bias
6 and prejudice, and that has proven very difficult for our
7 committee also, so we're still working on that. You
8 didn't like the idea of contempt in the first part of the
9 jury instructions, but you liked it in the second part. I
10 have attached an instruction from Florida on this point,
11 which I thought was fairly well drafted, if you're
12 interested in reconsidering it.

13 The Supreme Court recommended a rewrite and
14 emphasis on cell phone and internet usage, and we have a
15 new draft of that. The Supreme Court recommended a change
16 to the preponderance of the evidence to include the more
17 likely than not standard, so we've included a draft of
18 that, and we're still working on the signature page, which
19 everyone still agrees is confusing.

20 The new items that we didn't discuss last
21 time that I'd like to start with first and then go back to
22 the old items if we can is, first of all, juror
23 note-taking, and what I have done on page three of my memo
24 is our proposed instruction on juror note-taking, and I
25 also did a little short memo to you about note-taking to

1 kind of give you where we are on the issue.

2 Currently there is an instruction in the
3 pattern jury charge about note-taking. It's only in one
4 of the volumes, and it's prefaced with a comment that
5 says, "The committee expresses no opinion on whether it's
6 really okay for people to take notes or not." So it's
7 considered sort of a below the line comment rather than,
8 yeah, this is the law, and you're okay to do it. It
9 contains a sentence in it that we on the oversight
10 committee thought was silly, which is "Your personal
11 recollection of the evidence takes precedence over any
12 notes you may have taken." Okay. So we wanted to change
13 that. Also, and the reason why we actually want to get it
14 put into Rule 226a as an optional rule for the judges to
15 give -- and at this point we're just saying optional. If
16 you'll remember in the Legislature last year part of one
17 of the bills out there was basically mandatory instruction
18 to the jury about note-taking.

19 We wanted to start out with sort of an
20 optional idea because some judges are a little resistant
21 to it, and I think I've found the source of the resistance
22 to it, which is the Court of Criminal Appeals, so I've
23 attached an excerpt from the Court of Criminal Appeals
24 about juror note-taking. They allow juror note-taking in
25 criminal cases, but only after the trial judge has made

1 certain findings that this case is complicated enough to
2 warrant, you know, juror note-taking and then it goes
3 through this whole long set of instructions that you're
4 supposed to give the jury before you allow them to take
5 notes, and that's attached in that little memo I did on
6 note-taking, so you can see the excerpt from that.

7 So I think since most of our judges in the
8 state -- I think, I think the majority of judges in the
9 state are general jurisdiction judges where they handle
10 all types of cases. A lot of the judges, you know, are
11 reluctant to allow note-taking because they've got this
12 big kind of almost a prohibition against it in the Federal
13 (sic) court because, I mean, there's a little footnote
14 that they put in there. "We note that trial judges who do
15 not permit juror note-taking will eliminate review of the
16 matter on appeal." So, you know, I mean, they're not
17 exactly in favor of it when you read the case, even though
18 they say it's okay, you can do it under certain
19 circumstances.

20 So we wanted to give it -- you know, we
21 can't change the CCA opinion, but we wanted to put into
22 226a the imprimatur in civil cases that it's good, fine to
23 take notes, subject to certain instructions.

24 Also, apparently back in 1997 the Court
25 Rules Committee actually suggested that we include the

1 note-taking in Rule 226a, and I'm not ever sure -- I don't
2 know whether it got brought to this committee or what
3 happened to it, but I've attached the Court Rules
4 Committee's instructions also about juror note-taking to
5 that little memo I did.

6 CHAIRMAN BABCOCK: Is this the State Bar
7 committee you're talking about?

8 HONORABLE TRACY CHRISTOPHER: Yes.

9 CHAIRMAN BABCOCK: Not this committee.

10 HONORABLE TRACY CHRISTOPHER: Not this
11 committee. It was a State Bar committee. So their
12 proposed instructions are a little bit longer than ours,
13 include a little more details. We thought the simpler the
14 better, and so then we go to page three on our -- of the
15 April 1st memo, is our proposed instruction on juror
16 note-taking. So we didn't want to put a whole lot of
17 instructions in there about how the judge was, you know,
18 to handle the notes, other than "Don't take your notes out
19 of the courtroom," which other than during deliberations,
20 and we may or may not want to have that in there.

21 I'll tell you, one time my jurors had left
22 their notes in their seats during lunch, and the lawyers
23 in my case both agreed that it would be okay if they read
24 the jurors' notes, and I walked into the courtroom, and
25 I'm like, "What are you doing?"

1 "Well, we both agreed to it, Judge."

2 "Put those down." So my only concern about
3 actually saying "Don't take your notes out of the
4 courtroom" is that, but, you know, because lawyers will
5 agree to a lot of things if they think it would be useful
6 for them, so --

7 PROFESSOR HOFFMAN: "We've agreed to rob
8 this bank. It will help us settle our case."

9 HONORABLE TRACY CHRISTOPHER: So that's
10 where we are on it. The "Your personal recollection of
11 the evidence takes precedence over any notes you may have
12 taken" is actually also in the Court of Criminal Appeals
13 case, which is why I think that the, you know, below the
14 line comment from the pattern jury charge committee
15 included that statement, but we just thought that that was
16 not a good thing to have in the instruction. So that's
17 our proposal on page three.

18 CHAIRMAN BABCOCK: Ready to discuss that?
19 Yeah, Buddy.

20 MR. LOW: Tracy, when you say, "Do not share
21 your notes with others," does that mean you can't show it
22 to them, but you can say, "Okay, here's what I wrote"? I
23 mean, that's kind of sharing your notes. What does that
24 mean?

25 HONORABLE TRACY CHRISTOPHER: Our idea was

1 that you wouldn't give your notes to another juror.

2 MR. LOW: Yeah, I know, but --

3 HONORABLE TRACY CHRISTOPHER: But you could
4 read from them in the jury room.

5 MR. LOW: But can you tell the other, "Look,
6 I know what I'm saying. I'm reading right here. I'm not
7 going to share it and let you look at it, but that's what
8 I wrote." I know you say don't rely on other's notes, and
9 then what happens, they keep their notes and there's a
10 question of jury misconduct. Can those notes be
11 subpoenaed? Can they --

12 HONORABLE TRACY CHRISTOPHER: Well, that was
13 one of the questions that, you know, we discussed. You
14 know, different judges handle -- the judges that allow
15 note-taking now handle it differently. Some of them don't
16 let them take them back into the jury room for
17 deliberations. Some of them collect the notes at the end
18 of the trial and shred them. Some of them say, "If you
19 want to take your notes home, it's fine with me." So at
20 this point we were just kind of going to leave it up to
21 the judge's discretion on the matter.

22 MR. LOW: Okay.

23 CHAIRMAN BABCOCK: Okay. Yeah, Kent.

24 HONORABLE KENT SULLIVAN: The policy that I
25 recall being tossed around in favor of that language is

1 that the best note-taker is not supposed to be the most
2 influential person in the jury room, so it's not supposed
3 to -- the notes themselves are not supposed to become a
4 point of great influence in the discussions about that
5 lead to the verdict, at least that's what I've always
6 heard, and I don't know that it's still really a
7 meaningful point or not, but that was always the
8 justification.

9 MR. MEADOWS: I think it's a very important
10 point, and I would be interested in hearing how the
11 practice works with those courts that allow note-taking
12 but do not permit the jurors to take their notes into the
13 jury room, deliberation room, because it just seems to me
14 that a bully with a notepad is substituting their notes
15 for evidence and that's where the whole thing breaks down.
16 So I like the idea of taking notes, particularly in a long
17 trial is understandable, but I have strong concern about a
18 juror, particularly a strong personality, taking their
19 notes and substituting those for evidence that become part
20 of the deliberation.

21 HONORABLE TRACY CHRISTOPHER: Well, when I
22 first took advantage and started allowing jurors to take
23 notes I followed the procedure of not letting them take
24 their notes back into the jury room, and so we had this
25 sort of complicated system where if you wanted to review

1 your notes, deliberations had to end, you know, because
2 you've got to have all 12 of you in there. People would
3 then come back to the courtroom where they were allowed to
4 look at their own notes and then go back into the jury
5 room; and after a couple of years of that, I thought,
6 well, this is just kind of complicated and seems
7 unnecessary to me; and I started to say, "Yeah, take them
8 back with you"; and I've never had anyone complain about
9 it; but I can't say that I've asked at the end of a trial
10 whether, you know, someone felt that the best note-taker
11 was somehow, you know, pushing the others. So I don't
12 have any solid evidence on that point.

13 CHAIRMAN BABCOCK: Kent.

14 HONORABLE KENT SULLIVAN: I did test the
15 waters a couple of times in terms of asking jurors after
16 they had reached a verdict about note-taking and tried to
17 make it very clear they could say whatever they wanted,
18 you know, that it was a very sort of open atmosphere; and
19 once I got them rolling, so to speak, it was a firestorm
20 in terms of jurors think it's stupid not to be allowed to
21 take notes. It is counterintuitive not to be able to take
22 notes in a case that lasts any length of time at all. I
23 mean, and if my, you know, anecdotal experience was at all
24 instructive, I mean, it was off the charts how they feel
25 about it, and I think it rings of common sense.

1 Most people if they're going to be asked to
2 reach decisions based on digesting a collection of
3 unfamiliar information are going to be expecting that
4 they're going to be able to take notes, and so I think
5 that in terms of the user-friendliness of the process,
6 which is not at all inconsequential, I think you're
7 fighting a huge uphill battle in not allowing people to
8 take notes.

9 CHAIRMAN BABCOCK: Yeah, Hayes.

10 MR. FULLER: By the same token, if you allow
11 people to take notes, it seems to me it would also be
12 counterintuitive to tell them, "Having been allowed to
13 take the notes, you can't use them as you would use them
14 in any other context."

15 HONORABLE KENT SULLIVAN: Agreed.

16 MR. FULLER: And that means you're going to
17 rely upon them, you're going to argue from them, you're
18 going to attempt to persuade others from them.

19 HONORABLE KENT SULLIVAN: For what it's
20 worth, I actually raised that question, too, about what
21 would you think if you could take them but then couldn't
22 take them back, and same reaction, off the charts. People
23 just naturally expect to be able to take them and to be
24 able to use them.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: But they're also instructed to
2 listen to the views of others.

3 MR. FULLER: Sure.

4 MR. LOW: And I think that really dilutes
5 the idea of six or twelve people, because you're going to
6 say, "Well, I don't care, I have here." If you don't have
7 that you're going to say, "Well, this one says that and
8 that one that. Well, maybe I was wrong." In other words,
9 it takes away from that some also, listening to other
10 jurors.

11 CHAIRMAN BABCOCK: Okay. Any other
12 comments? Yeah, Harvey.

13 HONORABLE HARVEY BROWN: From what little
14 it's worth, when I had nonjury trials I certainly took
15 notes, found them helpful, particularly in a case that
16 lasted more than a day, and I didn't feel wedded to my
17 notes. In other words, I would learn things in final
18 argument or see things in the final argument that I may
19 not have caught the first time, and so I didn't think they
20 necessarily kept somebody from thinking about the case in
21 new ways and being able to deliberate.

22 CHAIRMAN BABCOCK: Did you take notes in
23 final argument?

24 HONORABLE HARVEY BROWN: Would I? Yeah, I
25 did take notes in final argument because I wouldn't

1 necessarily decide that day.

2 CHAIRMAN BABCOCK: Tracy. Judge
3 Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, for
5 example, I also, you know, as we're supposed to do now, I
6 actually do give my jurors a copy of the charge.
7 Apparently that doesn't happen all across the state; but
8 we have a good Xerox machine; and I give my jurors a copy
9 of the charge in every case; and I tell them to take notes
10 on the charge if they want to, you know, during closing
11 argument, which, you know, frankly, I think is useful in
12 any sort of complicated case; and if lawyers argued the
13 charge more, they would be better off when the jurors were
14 sitting there and, you know, kind of "Look at Exhibit 25,"
15 and they might write down "Exhibit 25" when they're on
16 that question to help them remember it's Exhibit 25 that's
17 going to help them answer, you know, this particular
18 question or that particular issue; or, you know, something
19 simple like lawyers who get up and testify as to the
20 amount of their attorney's fees.

21 Okay. It usually comes on and off in ten
22 minutes. Then, you know, "I think \$2,328.55 is a
23 reasonable charge for, you know, trial, and \$2,500 is a
24 reasonable charge for the court of appeals"; and jurors
25 don't remember those numbers; and even if they're

1 uncontested and want to award, you know, the 2,358.50, if
2 you're not taking notes, you know, it's kind of like "What
3 was that number again?" What did the lawyer -- we get
4 notes that say, "What did the lawyer testify to to the
5 amount of attorney's fees?" Because they can't remember.

6 CHAIRMAN BABCOCK: Judge Lawrence and then
7 Frank.

8 HONORABLE TOM LAWRENCE: Well, one of the
9 things that's not really addressed in the comment is the
10 problem that when you take a note and you put it on paper,
11 suddenly because it's on paper it seems to have some
12 increased importance to someone's recollection, and that's
13 not always the case. I was taking minutes at a meeting
14 recently, and I got distracted and totally missed a vote
15 on something, so you can make mistakes when you're taking
16 notes, and maybe there should be some sort of a comment
17 that just because somebody took a note and put it down on
18 paper doesn't give it any enhanced importance or
19 credibility.

20 CHAIRMAN BABCOCK: Okay. Frank.

21 MR. GILSTRAP: Would this rule give the
22 judge power to allow the jurors to take notes
23 electronically?

24 CHAIRMAN BABCOCK: You mean on their
25 laptops?

1 MR. GILSTRAP: Laptops. Sure, this is
2 Austin. We're all computer literate. Let them take
3 notes. Why not?

4 CHAIRMAN BABCOCK: Only in Travis County can
5 you take --

6 MR. GILSTRAP: Well, you know, I could see
7 that happening.

8 CHAIRMAN BABCOCK: Yeah.

9 MR. GILSTRAP: I mean, is that so different
10 from somebody who sits there and fills up two composition
11 notebooks during a one-week trial, you know, took good
12 notes in school? I mean, note-taking, we all think it's
13 some little pad that your juror is going to have, but I
14 could see that mushrooming into something else.

15 CHAIRMAN BABCOCK: And then you'll never get
16 rid of them.

17 MR. GILSTRAP: Right, they're posted on the
18 internet.

19 CHAIRMAN BABCOCK: Jim.

20 MR. PERDUE: Well, I love it when jurors
21 write down my numbers, but I had a -- I wanted to ask the
22 committee why the less is appropriate, less is more kind
23 of approach was taken, because obviously reading the
24 criminal appeals opinion there's a bunch, the prior
25 proposal was a bunch. I know when I've done it there's

1 been a lot more substance in the instructions from the
2 court, so I was just curious about it, and this is pretty
3 concise.

4 HONORABLE TRACY CHRISTOPHER: I just think
5 we felt that it was unnecessary and that we tended to
6 overload the jury with so many instructions that they
7 became meaningless, and even though they're written down,
8 if we give them a copy of them they rarely go back to
9 them, and so we wanted to keep it as simple as possible.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE TRACY CHRISTOPHER: But, I mean,
12 we can be more complicated if you want.

13 PROFESSOR ALBRIGHT: Is this an oral
14 instruction?

15 CHAIRMAN BABCOCK: Lonny.

16 HONORABLE TRACY CHRISTOPHER: No, it was
17 going to be part of 226a that's actually handed to them.

18 PROFESSOR ALBRIGHT: What's handed to them
19 before the trial.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 CHAIRMAN BABCOCK: Professor Hoffman.

22 PROFESSOR HOFFMAN: I'm really with this.
23 If you want to take notes, take notes. Don't take them
24 out of the courtroom, don't share them with other people.
25 That sounds right. It's true people make mistakes when

1 they take notes, just like we make mistakes in lots of
2 other ways, just like when eyewitnesses make mistakes, and
3 whatever. I mean, we really can't control this, and I
4 really must say I can't imagine that we're still trying.

5 I'm really -- I mean, Bobby, I hear you. So
6 maybe a juror will be a little bit more persuasive with a
7 pad, but we all saw "Twelve Angry Men," and there were a
8 lot of persuasive jurors without pads, and ultimately one
9 really persuasive juror without a pad, too. We don't know
10 what goes on in that room and why, and it does seem pretty
11 late in the day to be talking about this. We ought to
12 treat jurors like we would want to be treated ourselves.

13 MR. MEADOWS: Yeah, I disagree with that.

14 CHAIRMAN BABCOCK: Doesn't Buddy have a good
15 point about the sharing? That was Buddy's point, do not
16 share your notes, that's somewhat ambiguous because it
17 could mean you can't discuss them with other jurors. The
18 intent, as I understand from Judge Christopher, was that
19 you can't say, "Hey, here are my notes. Take a look at
20 these," but that it would be all right for one juror to
21 say, "Hey, my notes reflect that witness A said this."

22 HONORABLE TRACY CHRISTOPHER: Well, we could
23 certainly add after "Do not share your notes with other
24 jurors," "You may discuss your notes during" -- "the
25 contents of your notes during a deliberation," which is

1 one of the statements they have in the criminal case.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE TRACY CHRISTOPHER: We could add
4 that in there, if that was considered ambiguous.

5 CHAIRMAN BABCOCK: Yeah, Pete.

6 MR. SCHENKKAN: I would urge you instead or
7 first change "Do not share your notes with," to "Do not
8 show your notes to." "Share" is intrinsically ambiguous.
9 "Do not show your notes to" is not ambiguous.

10 And for a similar reason in the previous
11 sentence, "Any notes you take are for your personal use
12 and may be taken back into the jury room and consulted,"
13 the passive voice risks a little ambiguity. Maybe "Any
14 notes you take are for your personal use. You may take
15 them back into the jury room, and you may review them
16 during deliberations."

17 HONORABLE TRACY CHRISTOPHER: Okay.

18 CHAIRMAN BABCOCK: Yeah, Justice Gray.

19 HONORABLE TOM GRAY: Well, I'd like to hear
20 from the other trial judges, like Judge Peeples and Levi,
21 about their experiences, but it seems to me that this note
22 as currently drafted is -- as I understand it, is for the
23 front end of the trial, reading at the beginning, and
24 that's about the note-taking process and maybe something
25 about how you're going to be able to use them, but I don't

1 know where this -- you know, is there something else that
2 needs to go with this in the final instructions about
3 taking them to the jury room and what you can do with them
4 then, and is that not a better place to put these parts of
5 this rule that says you can't share them or show them
6 maybe or whatever that -- it seems like we're trying to
7 put too much on the front end for the jury, and maybe it
8 would be better to put, "Yeah, you can take them, this is
9 what" -- "how they're going to be taken," and a little bit
10 about how they can be used at the end, and then a more
11 descriptive instruction at the end of the trial, with the
12 instructions of this is -- you know, "They're not
13 evidence, you cannot default to them solely, rely upon the
14 evidence that you heard" kind of a thing.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: Sounds like you're saying you may
17 take notes at first for your own personal use and then
18 later tell them how they can use them, that they can't
19 exhibit and they can't tell somebody that's what their
20 note -- or so I think everybody agrees about taking them.
21 I don't think anybody is saying you shouldn't be able to
22 take them. I think the question is the further
23 instruction, as Judge Gray says, the use you make of them.
24 Just tell them they can take them for their own personal
25 use during the trial.

1 HONORABLE TOM GRAY: Although I will say I
2 think Frank's comment is well-taken because the electronic
3 aspect of it is you pull out your phone and you can take
4 voice notes. I mean, you know, there's going to be a real
5 fine line there of -- I mean, it's not going to be long
6 until Dee Dee's notes are available in the jury room and
7 everybody can review the transcript online in the jury
8 room, so, but for purposes of what we're doing here, I
9 understand that we're not there yet, and I was just
10 thinking about breaking this down into here's on the front
11 end some general instructions about taking them and then
12 on the -- after the trial is over and you're going to the
13 jury room, "Now let me tell you what you can do with your
14 notes, if any, that you took during trial."

15 HONORABLE TRACY CHRISTOPHER: Well, I mean,
16 that wouldn't be hard. We could do that because we have
17 the written instructions before the trial begins that they
18 get a copy of and then we have instructions that are
19 attached to the actual jury questions, so we could break
20 it up. I just like jurors to know ahead of time that they
21 are going to be able to use them, so that they'll know
22 that there's some reason they're taking notes.

23 CHAIRMAN BABCOCK: Buddy and then Kent and
24 then Frank and then Jane.

25 MR. LOW: But you could also tell them then

1 you'll be further instructed as to the use and effect of
2 these notes at a later instruction. In other words, you
3 could tell them they're for their own personal use and let
4 them know that there may be limitations or something just
5 right up front.

6 HONORABLE TRACY CHRISTOPHER: Well, I'm
7 hoping we don't have limitations, but we could do that.

8 MR. LOW: Well, there's got to be some
9 limitations, because like Frank said, you take a computer
10 in there, you can't take a dictionary, but you can take a
11 computer that's got a lot more than a dictionary on it.

12 MR. JACKSON: Got wi-fi on it.

13 MR. LOW: Or internet phone, something.
14 There's got to be some restrictions.

15 CHAIRMAN BABCOCK: Kent.

16 HONORABLE KENT SULLIVAN: We always struggle
17 I think with not saying what we really mean, and I think
18 what we really mean here is that you can take notes, but
19 these notes are subject to the court's control, and we
20 probably also want to say that they're only available for
21 use in the deliberative process and not for any other
22 purpose and not to be communicated to any third party. I
23 mean, I think that's where we're trying to go, and we may
24 need to revisit that.

25 One of the reasons we would probably never

1 allow the use of computer is lack of control. It's not
2 the, you know, the nature of memorializing the
3 information, is the fact that you realize that paper you
4 can take up and you can shred, and I think that's probably
5 the intent of most judges at the conclusion of a trial, is
6 that it's all retained. At least that seemed to be a
7 pretty common practice, that it's all retained and the
8 jurors' notes after the case is completely concluded, that
9 they're destroyed, and I think that probably is what would
10 give people pause about the use of computer. I don't
11 think it's the use of the computer per se. It's just the
12 simple lack of control over the information.

13 CHAIRMAN BABCOCK: Okay. Frank and then
14 Justice Bland and then Bill Dorsaneo.

15 MR. GILSTRAP: Why would we have a rule that
16 says you can read your notes to someone, to the other
17 jurors, but you can't let them look at them? I mean, that
18 seems kind of arbitrary. I mean, it is a problem using
19 these notes, "Well, you know, my notes say this."

20 "Well gosh, that's right; therefore, let's
21 decide the case that way." That's what we're all afraid
22 of, but why let them read them and not let them look at
23 them? It strikes me as somewhat arbitrary, and you know,
24 maybe there's a reason for that. I don't know.

25 CHAIRMAN BABCOCK: Justice Bland.

1 HONORABLE JANE BLAND: Well, with respect to
2 the note-taking, the -- some people listen better if they
3 can jot things down, so it's not really the fact that
4 we're trying to get a transcript of the trial, you know,
5 or copy what the court reporter is doing; but it's the
6 ability of jurors to listen better if they can write
7 something down as the case goes along; and I don't think
8 that there's a big problem with, you know, sharing of
9 notes, mainly because I think the jurors have an
10 expectation of privacy in their own notes; and they want
11 their notes to be private; and then, you know, if you
12 instruct them, you know, "Don't share your notes with
13 others," they don't, because they can read from them, they
14 can discuss them. Everybody knows that people are relying
15 on notes, and, you know, the ability of the notes to sway
16 the rest of the jury is only as good as the persuasiveness
17 of that juror.

18 And so, you know, I just -- there's never
19 been a problem with it, and I've never got any objection
20 from lawyers, never had any issue with note-taking. I
21 always let the jurors have the notes, and I think that's
22 what we should do; and I think we should give them all the
23 instructions at the very beginning so that they know that
24 they're going to be able to use their notes, because if
25 you don't tell them that they're going to be able to use

1 their notes then that's just one more question they've got
2 in their minds; and it's better to give them the
3 information on the front end just like it's better to know
4 what's going to be on the final, you know, before you take
5 it; and so I would vote for this very simple instruction
6 that the committee has proposed, the subcommittee; and I
7 would even take out the last two sentences because I think
8 "Any notes you take are for your own personal use" tells
9 the juror that that's -- they're not to be shared with
10 others; but if we want to emphasize that I'm okay with it,
11 too, but I don't think we need any more instructions than
12 the instructions that are right here.

13 CHAIRMAN BABCOCK: Professor Dorsaneo.

14 PROFESSOR DORSANEO: I'll just say that in
15 academic circles there's a controversy about whether
16 students should be able to take notes electronically, yes,
17 because it actually detracts from the attention that they
18 would otherwise pay, pay in class.

19 CHAIRMAN BABCOCK: Is it noise? Is it a
20 noise problem?

21 PROFESSOR DORSANEO: No they just record the
22 information for later thinking. Also, they surf the net
23 rather than -- or play cards or do whatever, and --

24 CHAIRMAN BABCOCK: Is this personal
25 experience from your classes?

1 PROFESSOR DORSANEO: No, they don't do it in
2 my class.

3 CHAIRMAN BABCOCK: You're talking about the
4 broader controversy.

5 PROFESSOR DORSANEO: But through teaching
6 evaluations they say the professor needs to put the people
7 who are just going to surf the net in the back row so they
8 don't detract from -- you know, distract the other
9 students.

10 CHAIRMAN BABCOCK: Buddy.

11 PROFESSOR DORSANEO: It's a very bad idea to
12 use these electronic devices to -- for jurors to take
13 notes.

14 MR. LOW: It's also real disheartening when
15 you've got an exhibit up there that you're trying to make
16 a point and somebody is sitting here and not looking up.
17 That's discouraging to the lawyer to say the least.

18 CHAIRMAN BABCOCK: Okay. Carlos, did you
19 want to say something?

20 MR. LOPEZ: I was looking for the back row.

21 CHAIRMAN BABCOCK: Jody.

22 MR. HUGHES: I was thinking about this issue
23 of whether -- you know, sort of the bully juror, and my
24 initial thought was, well, that's probably going to be to
25 some degree addressed by the fact that other jurors if

1 they can all take notes, it's just like if nobody is
2 taking notes and somebody says, "Well, I remember it this
3 way," you know, four other people say, "You know, that's
4 not how I remember it," and maybe other people have
5 competing notes that will trump that, but the only concern
6 I would have is if the jurors agreed in advance to
7 designate one person as the note-taker. You know, I think
8 this -- the flavor of this suggests that that shouldn't
9 happen, but it might be something more specific because if
10 they did that and somebody just said, "Well, I'm really
11 good at taking notes," and the rest of the jurors said,
12 "Oh, that would be great," that person could become a real
13 problem.

14 CHAIRMAN BABCOCK: Uh-huh.

15 MR. MEADOWS: Chip?

16 CHAIRMAN BABCOCK: Yeah, Justice Gray and
17 then Bobby.

18 HONORABLE TOM GRAY: I was just going to
19 say, because I was going to try to get back to this, in
20 the division of the potential -- I've got no problem with
21 what Judge Bland suggested, but there would still be the
22 need, I think, and I think it fits best in the
23 instructions to the jury about where there's a conflict in
24 the evidence, then refer back to the note-taking, that
25 those notes are not evidence, and if you have a

1 disagreement about a conflict in the evidence, there is a
2 way to resolve that, and then you have the evidence read
3 back. Just something in there that gives that person that
4 is being overridden by the bully the authority to go back
5 to that instruction from the judge and say, "But the judge
6 said if we don't agree with the evidence or what the
7 evidence is then we go back and we get to have the
8 evidence read back to us," if there's a disagreement.

9 CHAIRMAN BABCOCK: Bobby, then Kent.

10 MR. MEADOWS: That's really not a bad idea
11 from my perspective, because it seems that we all
12 generally agree that note-taking is helpful to the jurors,
13 they want to take them, and they want to use them, and so
14 the basic question for us, I think, is whether or not we
15 are concerned or should be concerned about jurors in the
16 deliberation using their notes to -- whether they share
17 what they've written down by, you know, looking at the
18 page or reading it or actually showing it, as Frank
19 discusses, to persuade others.

20 If we don't -- if we're okay with that then
21 it seems to me that this instruction is probably fine.
22 Maybe it needs to have some sort of cautionary language
23 about notes and those who don't have notes, but if we --
24 if we do not want that or if we fear that the -- someone
25 with the notes is going to be able to move jurors, because

1 I disagree with Jane. I mean, we obviously -- those of us
2 that have mock tried cases have seen many, many times
3 someone read from their notes and silence their opposing
4 juror who doesn't have notes. They just -- that person
5 all of the sudden is quieted by the fact that there is
6 this, you know, statement or this recollection that's in
7 writing. So that's my only concern.

8 If we don't care that the jurors do that
9 then I think this instruction is fine, with possibly the
10 note that somehow we can arm the non-note-taker that they
11 don't have to be bullied or accept the juror with notes.

12 CHAIRMAN BABCOCK: Kent Sullivan, then
13 Justice Bland, then Alex.

14 HONORABLE KENT SULLIVAN: I just want to
15 make one quick observation so that maybe to get back to
16 50,000 feet for a moment, if it's not perhaps germane to
17 the current calculus, but I think it really is worth
18 noting. I think we have to ask ourselves the question
19 what is the use of notes, you know, why are we even
20 talking about note-taking, and what -- you know, what's
21 the real purpose of it, and I think for the most part what
22 it is, is a confirmation or that the jurors are trying to
23 confirm what happened in the courtroom, what did the
24 witness say. It's Judge Christopher's reference to "Did
25 that lawyer testify to \$2,812 because I've forgotten?"

1 Probably the only other use for them that's
2 much less consequential is to use them as some point of
3 interpretation of the facts, but for the most part I think
4 it's a question of the facts, and by the facts I mean what
5 happened in the courtroom, and the fact that we're sitting
6 here talking about note-taking is extraordinary. It is
7 2008, and the fact -- and everybody else when they can't
8 remember what happened on TV two minutes ago, they press
9 the rewind button and they replay it, and that is their
10 current expectation as a modern human being, but in the
11 courtroom we put them in a time machine, and we take them
12 back about 25 or 30 or 50 years and say, "We're going to
13 play by rules and a process that will be unfamiliar to you
14 and probably make no sense to you because it is so old and
15 so antiquated," and that is one reason why I think that
16 we've got problems with jury trials in general is because
17 we are continuing to have this type of discussion, and
18 this discussion is completely out of date.

19 We ought to have a process that memorializes
20 the evidence that the jurors have quick reference to. If
21 it's going to be visual, it needs to be a realtime process
22 for the court reporter that's immediately available to the
23 jurors. If it's going to be even better than that, you
24 could have some sort of video process where they would
25 have it available. The notion that the jurors would get

1 it wrong in Judge Christopher's hypothetical because the
2 witness testified to the number 2,812 and they're in there
3 fighting only because they didn't have any notes, they
4 have no way -- I mean, he either said it or he didn't, and
5 the notion that our process is defective because we have
6 this huge disconnect between the jury room and, you know,
7 the memorialization of the process is really a huge defect
8 in the process and goes beyond note-taking.

9 MR. GILSTRAP: You want to Tivo the trials.

10 HONORABLE KENT SULLIVAN: I'm sorry?

11 MR. GILSTRAP: You want to Tivo the trials.

12 HONORABLE KENT SULLIVAN: Well, I'm simply
13 saying that you could do much better than what we've got
14 and the conversation we ought to be having is one that
15 would be much more progressive and much more modern.
16 We're having an interesting conversation. It's 25 years
17 too late.

18 CHAIRMAN BABCOCK: So you're in favor of
19 notes. Justice Bland.

20 HONORABLE JANE BLAND: And, Bobby, I think
21 what I'm saying is not -- I think it's perfectly fine for
22 a juror that has notes to silence a juror that doesn't
23 have notes if the juror that's silenced says to himself,
24 "Well, she listened, she took notes. I was asleep that
25 day, so, you know, I'm going to go with her." I don't

1 think a note-taker who affirmatively misstates the facts
2 gets away with it. I think it's more that people do --
3 may tend to rely on note-takers, but is that such a bad
4 thing if those are the people that were listening during
5 the trial?

6 And if the others who did not take notes
7 were also listening then they can, you know, certainly
8 weigh in if the note-taker is incorrect, but just to
9 basically say, "Well, jurors shouldn't listen to other
10 jurors who take notes" and, you know -- yeah, I say to
11 myself if those jurors were the ones that were paying
12 attention then what's the harm in that?

13 MR. MEADOWS: And there may not be any, and
14 that's why I say there's sort of this foundational
15 question about whether we care or not, but see, I disagree
16 a little bit with Kent in terms of why people take notes.
17 I mean, you try cases and cases last any length of time at
18 all, you don't have just a bunch of objective note-takers,
19 stenographers. I mean, basically what happens is jurors
20 are leaning one way or the other, because at trial you
21 find that your jurors are taking notes when you're saying
22 something or your witnesses are saying something they like
23 and support the side of the case that you hope that they
24 -- you know, and same for the other side, so jurors do
25 become advocates, and they're looking for evidence and

1 information to support their view of the case, at least at
2 that particular time.

3 And so to let someone have that and use it
4 at an -- as a piece of advocacy is -- you know, is the
5 question. I'm not even going to say it's the concern,
6 because -- but the point is the person with the notes does
7 silence a juror who -- I mean, someone in the deliberation
8 who doesn't have and who feels overpowered by the fact
9 that someone has got this written down, and that's why I
10 say do we care?

11 CHAIRMAN BABCOCK: Professor Albright.

12 PROFESSOR ALBRIGHT: Well, I think in answer
13 to what Bobby was just talking about, I think jurors are
14 human beings, and people overpower other human beings and
15 take advocacy positions all the time, and whether I have
16 notes or not, if I'm a strong person and I say, "By god,
17 this is the way I believe it," I might silence them
18 anyway. Probably the notes silence them, too, but my
19 point is that I think we can say all kinds of things in
20 there about don't -- you know, the person who takes notes
21 is not the person who knows the evidence, but they're
22 going to act like people no matter what. I'm not sure
23 that any statement that we say in an instruction about
24 that is going to have any impact. I think the best one
25 would be the one -- the idea about, you know, when -- if

1 you do have a disagreement the notes aren't -- don't
2 control it, ask to be read back the evidence, but that's
3 why I like the short thing.

4 I would add that the bailiff will collect
5 the notes after the trial. I think it's important to tell
6 them that they -- that the notes will be taken up because
7 now with all the books that jurors write I think there is
8 some talk about jurors taking notes so that they can write
9 books, and also, if you write personal things or
10 embarrassing things in your notes, I think you just -- it
11 makes sense to warn them that they're not their notes,
12 they're going to be taken up.

13 CHAIRMAN BABCOCK: Yeah. Judge Christopher,
14 then Jim, and then Richard.

15 HONORABLE TRACY CHRISTOPHER: Well, I want
16 to talk about the reading back the testimony issue because
17 that is a huge issue, and it's something that, you know,
18 I'm -- we can talk about that the rest of the day, reading
19 back the testimony, because there are so many people that
20 say, for example, we don't want the jurors to have a
21 written transcript of the trial because -- even if our
22 court reporter was good enough to have it done, you know,
23 ready for them to have the next day, because there's the
24 nuance of the presentation, and we all know how a person
25 can answer a question. They can answer it sarcastically

1 on the witness stand or -- but it doesn't look that way on
2 a paper. Like somebody might say, "of course," when you
3 know, and it looks like, oh, yeah, I'm really agreeing
4 with you when they weren't agreeing with you at all.

5 MR. LOPEZ: They say, "Yeah, sure."

6 HONORABLE TRACY CHRISTOPHER: So and, in
7 fact, we don't tell the jury that they can ask for
8 testimony, now. It's only when they write us a question
9 that we then send back this, you know, "Please don't
10 bother us with your questions" instruction that we send
11 them, which is in Rule 287, and the pattern jury charge of
12 -- you know, we send back, "Oh, it's going to be really,
13 really hard for our court reporter to find it, but maybe
14 if you tell us just a tiny little thing that you can't
15 remember, maybe, maybe in about four or five hours we'll
16 come up with it for you," because, you know, and I'm -- if
17 it's how much did the lawyer testify to, sometimes I get
18 the lawyers to agree, "Can we just tell them \$2,225," but
19 when it's a serious, hotly contested issue that covered 15
20 witnesses, it's just not possible to answer the question
21 with the transcript generally, which is why we always say
22 we need to know specifically what witness you were talking
23 about, what point you were talking about that you can't
24 remember or that you have a disagreement about, so, you
25 know, we get into this whole other problem if we tell the

1 jury, "Oh, yeah, if your notes are unclear, please, you
2 know, let us know what it is that is unclear and we'll
3 read it back to you." So I would really be against that.

4 CHAIRMAN BABCOCK: Jim.

5 MR. PERDUE: Well, this tailors into that
6 observation, but going to Bobby and then also what Kent
7 was identifying, you know, there's still a process, and
8 there is not a Tivo button for what happens in a
9 courtroom, and people's perceptions are based on what they
10 see. I've had a -- I had a long med mal case. I think
11 Judge Brown was the judge, and people were taking notes
12 throughout it, and it was a key issue on doubling time of
13 cancer. Well, somebody had written down numbers wrong. I
14 mean, it wasn't anything intentional, but if you write
15 down the numbers wrong, and I get them backwards all the
16 time, then all of the sudden you've got notes.

17 The only thing that I would say, and you're
18 right on that, but philosophically if the trial and the
19 evidence is ultimately what you're after, why not add a
20 sentence -- because I agree with you, don't overengineer
21 the thing, but "Your notes are not evidence. The only
22 evidence has been the sworn testimony and exhibits which
23 have been admitted during trial." And at least you
24 empower then either a juror who didn't take notes or a
25 juror who had a different recollection to be able to say,

1 "Okay, you've got some notes to that, but we've still got
2 to be able to talk this out because your notes aren't
3 going to trump the actual evidence at trial," and so I
4 don't think that there should be -- you've got to be able
5 to make sure that the ultimate foundation for the
6 deliberations is what was actually admitted as opposed to
7 what somebody wrote down that they thought they heard, and
8 that would be the key concern.

9 CHAIRMAN BABCOCK: Richard Munzinger.

10 MR. MUNZINGER: Well, I agree with him a
11 hundred percent. The risk is that a juror who takes
12 notes, the note becomes the collective memory, even though
13 that may or may not have been the testimony. We're all
14 humans, and we all view things through our own
15 perceptions, so I hear complex testimony, and I write down
16 the way I understand it. So it may or may not be a
17 correct perception, and it would seem to me that if you're
18 going to have a rule that says you may take notes, there
19 needs to be some caveat along the lines of Jim's that the
20 individual juror's notes do not by reason of the fact that
21 the notes were taken override the collective memory or
22 memory of individual jurors.

23 And the other thing that prompted me to
24 raise my hand was why would you not allow a juror to take
25 his or her notes with him at the end of a trial? They're

1 citizens. It's public business. Who would the government
2 be to confiscate my notes from a jury trial in a public
3 trial? I can't imagine such a thing.

4 CHAIRMAN BABCOCK: Now, don't get all worked
5 up now.

6 MR. MUNZINGER: I was worked up when I woke
7 up. But I can't imagine saying to a citizen that you
8 can't do this. In America? Really.

9 CHAIRMAN BABCOCK: Professor Hoffman.

10 PROFESSOR HOFFMAN: So I've been taking some
11 notes, and perhaps this might be a way of moving things
12 along as a slight maybe modification of some language that
13 kind of tracks what we're talking about, so the first two
14 sentences I think are, frankly, even wordier than they
15 should be. Maybe something like this, so this would be
16 one per sentence. "During the trial if taking notes will
17 help you focus your attention on the evidence and will not
18 be a distraction then you may take notes." So I would say
19 that first.

20 As a second sentence I would say exactly
21 what Jim just said. I would say something like "Neither
22 your notes nor those of your fellow jurors are evidence,
23 but you may take your notes back into the jury room for
24 your deliberations." And then I must say that I agree
25 with Richard. I think that we don't need a third

1 sentence, but if you want a third sentence, presumably it
2 would say something like "Don't take your notes out of the
3 courtroom" and maybe also Alex's point about the bailiff
4 is going to arrest you if you do or maybe something nicer.

5 CHAIRMAN BABCOCK: Buddy.

6 MR. LOW: Chip, I know this is not on here,
7 but if you really want to go to the future, we had a case
8 that lasted four and a half months. We do things
9 different in Beaumont and --

10 CHAIRMAN BABCOCK: Stipulated.

11 MR. LOW: Well, and we had to submit -- we
12 had over a hundred witnesses. We had to submit a picture
13 of each witness. Each juror had a notebook with those
14 pictures. They could write on there "He's a lying SOB."
15 They could write their own impression of the witness, what
16 he said and so forth, and no holes were barred. They took
17 them back there and got a verdict. I mean, but, in a
18 complicated case like that, it is very difficult to even
19 remember somebody that testified a month before. "Who was
20 he?"

21 "Oh, remember, he had a black mustache and
22 gray hair. Yeah, here's his picture right here. Well,
23 here's what I thought, and here's what I thought." So
24 there's more to it. I mean, we're going to get down to
25 something like that in big cases. You were involved in

1 it, in the case.

2 HONORABLE TOM GRAY: What happened to the
3 notebooks?

4 MR. LOW: The judge did whatever he wanted
5 to with him. We never saw them. I think he destroyed
6 them after the verdict. It was -- but that's exactly what
7 happened.

8 CHAIRMAN BABCOCK: Judge Christopher, the
9 idea for this rule is when you say "optional instruction,"
10 that's to give the trial judge discretion whether to read
11 this instruction or not?

12 HONORABLE TRACY CHRISTOPHER: Yes.

13 CHAIRMAN BABCOCK: Okay. So this proposal
14 is to give the trial judge discretion to read a
15 note-taking --

16 HONORABLE TRACY CHRISTOPHER: Yes, because
17 we wanted, especially the general jurisdiction judges, to
18 feel like in a civil case, you know, note-taking was fine,
19 here's the instruction, and you don't -- we don't need to
20 worry about the Court of Criminal Appeals' really, really
21 long and complicated set of instructions for note-taking.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE TRACY CHRISTOPHER: I mean, we
24 could say it in all cases, but I'll tell you this, and I
25 can't remember the bill that was being discussed in the

1 last legislative session, which was, you know, juror
2 improvements, and one of the improvements was a mandatory
3 juror note-taking and mandatory that the judges were going
4 to pass out pens and pads of paper to all jurors so that
5 they would be able to take notes, and I mean, judges are
6 like, "I don't have the budget for it," and it was -- it
7 was a huge hue and cry on making it mandatory in some
8 areas of the state.

9 CHAIRMAN BABCOCK: Yeah. Carlos.

10 MR. LOPEZ: I have a question. Is the --
11 when you say it's optional, the instruction is optional.
12 It's optional whether to allow the note-taking, but if you
13 allow the note-taking, is the instruction mandatory when
14 you allow the note-taking?

15 HONORABLE TRACY CHRISTOPHER: Yeah, I think
16 that's the way we would want to phrase it.

17 CHAIRMAN BABCOCK: That makes sense.
18 Justice Bland.

19 HONORABLE JANE BLAND: I would just put in a
20 plug for not writing "optional instruction on
21 note-taking." Just write "instruction on note-taking" and
22 if the trial judge chooses to make it -- you know, chooses
23 not to give the instruction, you know, then it would be up
24 to the lawyers to say, "Hey, we want the instruction on
25 note-taking"; but, you know, when we put "optional" in

1 front of that the idea that it's going to filter its way
2 down into all the trial courts, it's going to be another
3 hundred years; and I think really we should strongly
4 signal that it is okay for jurors to take notes in long,
5 complicated civil cases. There really is no civil case
6 where notes wouldn't help some jurors, and since we leave
7 it up to the individual juror whether or not they want to
8 take notes, you know, I don't see that we need to even
9 make the instruction optional.

10 CHAIRMAN BABCOCK: Okay. Harvey, I think
11 you had your hand up before Kent got his up.

12 HONORABLE HARVEY BROWN: I just wanted to
13 speak to where we put the instruction. I think it's
14 better in the court charge, and here's why. I think when
15 you tell the jurors initially they can take notes, which I
16 just did orally at the start of the trial, they presume
17 they're going to get to take them to the jury room. They
18 presume they can use them, but it's left there everyday,
19 the bailiff handles it, it's no problem. It's kind of low
20 key. But if -- really the time it's important is when
21 they're going to use it in the jury room in deliberations,
22 and if I want to empower a juror to tell another juror,
23 "Listen, your notes aren't any more important than my
24 memory" they have to have that instruction then that they
25 can use in the deliberations. They're not going to have

1 the 226a, the very first instructions. Those are given
2 orally.

3 HONORABLE TRACY CHRISTOPHER: No, they're in
4 writing.

5 HONORABLE HARVEY BROWN: The second ones are
6 given in writing, but a lot of them don't keep them all
7 the way through the trial. What they use in deliberations
8 is the court's charge, so while we have that little sheet
9 of paper we give them with the short instructions under
10 226a, what they really are using in the deliberations is
11 the charge itself. I think that helps one juror tell
12 another juror, "Your notes aren't any more important than
13 my memory," and I do think we need something like, you
14 know, "Your notes aren't evidence." I did that. I never
15 had a problem with it.

16 CHAIRMAN BABCOCK: Kent.

17 HONORABLE KENT SULLIVAN: I agree with
18 Harvey. I think it ought to be probably listed twice, in
19 the beginning and then in the court's charge. That makes
20 a lot of sense, and the second thing I want to say is I
21 want to echo Judge Bland's comments and take it one step
22 further. I really think -- I would strongly encourage the
23 Court to mandate that jurors are allowed to take notes. I
24 mean, it is 2008. I think that it is an unbelievable
25 conversation for us to be having that there is a continued

1 discussion over whether jurors take notes when they're
2 deciding a case in controversy.

3 CHAIRMAN BABCOCK: Justice Gray.

4 HONORABLE TOM GRAY: I would recommend a
5 rewrite on the first two rules, and maybe there's a reason
6 that it's arranged like it is, but it just seems to me
7 that the following would make it simpler: "You may take
8 notes during the trial, but you should not take notes if
9 it takes" -- "if taking notes will distract your attention
10 from the evidence." Just collapse the concepts because if
11 you have in there --

12 CHAIRMAN BABCOCK: Sort of what Professor
13 Hoffman thought.

14 HONORABLE TOM GRAY: -- if note-taking will
15 help you focus on the evidence, it just -- I don't know,
16 it just -- that seems to be distracting to me.

17 CHAIRMAN BABCOCK: Buddy.

18 MR. LOW: Chip, there's got to be some
19 limitation, though, because what if the 12 jurors get
20 together, you have somebody that takes shorthand, say,
21 "You're going to be our note-taker." Say, "Okay, we're
22 going to listen and you're going to" -- she writes it down
23 in shorthand and that becomes the record almost. What's
24 to prevent that? I mean, it doesn't say everybody has to.
25 What's to prevent somebody, say a court reporter, from

1 being on the jury, and she says, "Okay, we can take notes,
2 you be the note-taker, you can do it, you know what you're
3 doing," and that -- that's scary.

4 CHAIRMAN BABCOCK: Justice Bland.

5 HONORABLE JANE BLAND: Nobody takes
6 shorthand anymore.

7 MR. LOW: Some people old as I am.

8 CHAIRMAN BABCOCK: Well, maybe back 25 years
9 ago they did.

10 HONORABLE JANE BLAND: I was --

11 HONORABLE TRACY CHRISTOPHER: I would age
12 you out of the jury system.

13 HONORABLE JANE BLAND: But I do think that
14 sometimes jurors rely on -- I mean, I think they look
15 around and they say, "Oh, good, you've got us covered,
16 you're taking notes" and, "Oh, good you've got us
17 covered." They look and they see that there are a couple
18 of people taking notes, just like they did all the way
19 through high school and college, you know, "Oh, look,
20 yeah, she's got it covered, she's taking notes," but I
21 don't think that, you know, that that person's -- if that
22 person is not credible as a note-taker that they're going
23 to end up controlling the dialogue, but I do think they do
24 rely on people to cover them taking notes sometimes.

25 MR. LOW: But they vote.

1 HONORABLE JANE BLAND: I think it's what
2 Professor Albright said. You can't really change human
3 nature and especially somebody's human nature that was
4 formed in primary school, and I don't think it's anything
5 unusual to these people to come in and have a collective
6 group, sort of have some take notes, some not take notes,
7 and some people not even pay attention from day one and
8 then together get together and figure out what they're
9 going to decide, using all their collective wisdom, and so
10 I would go with Professor Hoffman's suggested changes and
11 leave it at that and let the jurors do what they've done
12 every day since they were in fifth or sixth grade and they
13 first started learning how to take notes.

14 CHAIRMAN BABCOCK: Professor Dorsaneo.

15 PROFESSOR DORSANEO: Is there any problem of
16 jurors writing down things in their notes that didn't come
17 from the evidence?

18 HONORABLE JANE BLAND: Yes. They write down
19 "This trial is so boring," and you know, things like that.

20 HONORABLE TRACY CHRISTOPHER: "This guy's a
21 liar."

22 CHAIRMAN BABCOCK: That may be a reasonable
23 interpretation of the evidence.

24 HONORABLE JANE BLAND: But, you know, that's
25 where I think you get to this point where, you know,

1 jurors have a reasonable expectation of privacy in their
2 notes, and they can take them home if they want to take
3 them home, and they get shredded at the end of the trial
4 if they don't, and you know, I don't think there's a big
5 issue of everybody handing around their notes because they
6 write things that are personal to them. "Call home and
7 tell them," you know, whatever.

8 CHAIRMAN BABCOCK: Justice Patterson.

9 PROFESSOR DORSANEO: I mean, personal
10 experiences, things that are not --

11 HONORABLE JANE BLAND: Those are my -- I
12 have personally seen "This trial is so boring."

13 PROFESSOR DORSANEO: No, I mean the jurors'
14 personal experiences, things that we tell them that
15 they're not supposed to even talk about.

16 HONORABLE JANE BLAND: That's what I mean.
17 We're not going to be trying to -- we're not looking at
18 their notes.

19 PROFESSOR ALBRIGHT: Bill, if they're going
20 to write -- if you're worried about them writing it down
21 and talking about it, they're going to talk about it
22 anyway. I mean, if they're going to violate the
23 instructions, they're going to violate instructions, and
24 not writing it down --

25 PROFESSOR DORSANEO: I think when people are

1 told instructions they might violate them, but if they're
2 not given the instructions, they're certainly not going to
3 follow them. So I think people would write notes not so
4 much to refresh their recollection about the evidence but
5 just to write down whatever they would think would be
6 pertinent that would come to their --

7 CHAIRMAN BABCOCK: Their impressions of the
8 lawyers.

9 PROFESSOR DORSANEO: Yeah. I've seen
10 pictures drawn of lawyers with the, you know, the tails
11 and --

12 MR. LOPEZ: Horns.

13 PROFESSOR DORSANEO: -- pitchforks, but we
14 tell jurors "Don't consider certain things during the
15 deliberations and don't share your personal
16 experiences" --

17 CHAIRMAN BABCOCK: Yeah.

18 PROFESSOR DORSANEO: -- or things like that,
19 and this relates to the issue of sharing your notes, I
20 suppose, but I like the sentence that says, "Do not share
21 your notes with other jurors" because I think the notes
22 will have things in them that they shouldn't be talking
23 about.

24 CHAIRMAN BABCOCK: Okay. Hayes, and then
25 we're going to start taking a couple of votes.

1 MR. FULLER: Along those same lines, what if
2 those notes contained evidence of juror misconduct, which
3 we are allowed to ask about following the trial. Is that
4 not destruction of potential evidence of that? I mean --

5 CHAIRMAN BABCOCK: Here's the vote I think
6 we ought to take. Let's see the sense of the committee,
7 if there's anybody or how many people think that we
8 shouldn't have a rule at all, that we ought to just leave
9 the practice as it is with no rule. So everybody that's
10 in favor of that raise your hand.

11 HONORABLE STEPHEN YELENOSKY: I'm sorry, I
12 missed what the practice was.

13 HONORABLE TRACY CHRISTOPHER: No rule at
14 all.

15 HONORABLE STEPHEN YELENOSKY: But you can do
16 it or not? The trial judge can decide --

17 CHAIRMAN BABCOCK: Whatever's happening now.
18 No rule at all. How many people are in favor of that?
19 Okay. No hands raised on that.

20 The next question is discretion versus
21 mandatory. I'll ask people to raise hands who think that
22 it should be optional or discretionary with the trial
23 judge. How many people are in favor of that?

24 HONORABLE TRACY CHRISTOPHER: Wait, wait.
25 To read the instruction or to allow the note-taking at

1 all?

2 CHAIRMAN BABCOCK: To read the instruction.
3 In other words, give discretion to the judge to read the
4 instruction.

5 MR. LOPEZ: In a case where he's already
6 decided to allow the note-taking?

7 MR. GILSTRAP: I think we ought to decide
8 whether to allow note-taking or not.

9 HONORABLE STEPHEN YELENOSKY: You're
10 assuming you can allow notes or not, and if you do allow
11 them the question is do you have discretion to give the
12 order.

13 CHAIRMAN BABCOCK: Yeah, okay. Judge
14 Benton.

15 HONORABLE LEVI BENTON: Might I suggest that
16 the next vote should be on whether the trial judge must or
17 may tell the jurors they have the right to take notes?

18 MR. LOW: Yeah, I agree.

19 CHAIRMAN BABCOCK: Okay. That's fine. So
20 the vote will be -- Judge Christopher, how would you frame
21 the vote?

22 HONORABLE TRACY CHRISTOPHER: Whether the
23 instruction that you may take notes is mandatory in all
24 civil cases.

25 MR. GILSTRAP: It's not the instruction.

1 It's the taking of notes.

2 HONORABLE TRACY CHRISTOPHER: Well, but I
3 mean, we're not telling people you have to take notes.
4 We're telling them you may take notes.

5 HONORABLE LEVI BENTON: You have a right to
6 take notes.

7 HONORABLE TRACY CHRISTOPHER: Should that be
8 read in every case?

9 CHAIRMAN BABCOCK: That's it. Should this
10 instruction on juror note-taking be read in every case?

11 HONORABLE DAVID GAULTNEY: Every civil case.

12 CHAIRMAN BABCOCK: The effect of that would
13 be to make it mandatory.

14 MR. LOW: You're not going to read it if the
15 judge is not going to allow it.

16 MR. LOPEZ: Well, that's what he's saying.

17 CHAIRMAN BABCOCK: Well, but the judge is
18 going to have to allow it if we say you must read it. All
19 right. That was the flip side of making it discretionary.
20 All right. How many people think it should be mandatory?
21 Raise your hand. 29 for mandatory.

22 How many people think discretionary? The
23 1983 crowd.

24 MR. LOW: No, the 1883 crowd.

25 CHAIRMAN BABCOCK: Sorry, Buddy. Buddy said

1 1883. 29 for mandatory, 4 for discretionary, so that's --

2 HONORABLE JAN PATTERSON: We'll make a
3 carbon copy for you, Buddy.

4 MR. LOW: Put it on an onion skin.

5 CHAIRMAN BABCOCK: And I think in terms of
6 the language, Judge Christopher, I think the discussion
7 will be helpful to the Court to come up with the specific
8 language, so why don't we -- is the next issue the
9 interpreter instruction?

10 HONORABLE TRACY CHRISTOPHER: Yes.

11 CHAIRMAN BABCOCK: Let's go to that.

12 HONORABLE TRACY CHRISTOPHER: Well, I don't
13 mind having our committee come back because we're going to
14 have to come back with a whole new version. Do you not
15 want us to do that?

16 CHAIRMAN BABCOCK: No, that would be fine if
17 you want to do that.

18 HONORABLE TRACY CHRISTOPHER: Okay. The
19 next --

20 MR. MEADOWS: Sorry, Judge. I mean, the way
21 I voted, it was in contemplation of a rule that would
22 include this way we developed it in the conversation, with
23 the limitation on use and so forth.

24 CHAIRMAN BABCOCK: Right.

25 MR. MEADOWS: But we didn't do anything

1 about Harvey's suggestion, which I happen to agree with,
2 that this instruction should be in the charge. Is that
3 something we need to deal with or is that just part of the
4 dialogue that goes to the Court?

5 CHAIRMAN BABCOCK: Well, I think it's for
6 the dialogue that goes to the Court, but Judge Christopher
7 says since they're going to come back to us anyway,
8 they'll take all these comments into consideration and --

9 MR. MEADOWS: Fair enough.

10 HONORABLE TRACY CHRISTOPHER: Well, could I
11 have a vote on whether people want it in both places?

12 CHAIRMAN BABCOCK: Sure.

13 HONORABLE TRACY CHRISTOPHER: Pretrial and
14 in the charge.

15 CHAIRMAN BABCOCK: Yeah, that's a good idea.
16 So back to note-taking, how many people think that in
17 addition to being in Rule 226a that it also should be in
18 the jury charge?

19 HONORABLE TRACY CHRISTOPHER: 226a is the
20 jury charge, too.

21 CHAIRMAN BABCOCK: Well, in the jury charge.
22 How many think it should not be in the jury charge? So
23 that's unanimous, 30 to zero, the Chair not voting, and
24 Judge Christopher.

25 HONORABLE TRACY CHRISTOPHER: Could we have

1 one more vote? Could we have a vote on destruction of the
2 notes or allowing people to take their notes home?

3 CHAIRMAN BABCOCK: Okay. The --

4 MR. MEADOWS: This is a vote for America or
5 not.

6 CHAIRMAN BABCOCK: The Munzinger vote for
7 America.

8 MR. LOPEZ: No, it's a vote for Ebay or not
9 because that's where they're going to end up.

10 MR. GILSTRAP: As I understand, it's are
11 they allowed to take them home or are they given to the
12 court and the court can decide to destroy them or
13 whatever.

14 CHAIRMAN BABCOCK: Right.

15 MR. GILSTRAP: All right.

16 CHAIRMAN BABCOCK: How many people think
17 that the notes should be the property of the court?

18 HONORABLE JANE BLAND: Hold on.

19 CHAIRMAN BABCOCK: Wait. Hold on.

20 HONORABLE JANE BLAND: Well, I don't see
21 those as an either-or thing. If the juror wants to take
22 their notes, you know, they can take their notes. If the
23 juror leaves their notes behind, you know, are we talking
24 about trying to keep some record of the notes, or I guess
25 what I'm trying to find out is are we voting about whether

1 these become court records?

2 CHAIRMAN BABCOCK: No. No, no, no.

3 MR. LOPEZ: We're voting about whether
4 they're allowed to take them home at all.

5 CHAIRMAN BABCOCK: Yeah. Whether or not the
6 notes are under the court's control. I suppose if the
7 judge said, "Munzinger, you can have your notes, go write
8 a book about this trial if you want."

9 MR. LOW: During the trial you mean?

10 HONORABLE TRACY CHRISTOPHER: No. After the
11 trial. After the trial.

12 CHAIRMAN BABCOCK: No, after the trial.
13 Judge Christopher, you're the one that raised it. Frame
14 the issue.

15 HONORABLE TRACY CHRISTOPHER: Well, I guess
16 the question is, right now the instruction is silent on
17 what we do with the notes after the trial, and so the
18 question is should we leave it silent or should we have an
19 instruction that says the notes --

20 CHAIRMAN BABCOCK: The bailiff collects the
21 notes after the trial.

22 HONORABLE TRACY CHRISTOPHER: -- will stay
23 in the court. Some sort of, you know, "We're going to
24 collect your notes at the end."

25 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Well,
2 obviously I'm behind because I missed the beginning, but I
3 would change my vote about taking notes if I have to
4 instruct the jurors that I'm collecting their notes at the
5 end.

6 CHAIRMAN BABCOCK: Judge Benton and then
7 Carlos.

8 HONORABLE LEVI BENTON: The Supreme Court
9 should make clear that the notes in no way become court
10 records and that each juror has every right to destroy or
11 take the notes or leave the notes behind and that if they
12 are left behind the Supreme Court should make clear that
13 the court staff has the obligation to destroy the notes.

14 CHAIRMAN BABCOCK: Carlos.

15 MR. LOPEZ: I'm not a huge fan either way, I
16 don't really care that much, but if we are going to pick
17 them up mandatorially, we definitely need to tell them
18 that ahead of time, because I think we're violating their
19 privacy. We've said the notes -- we may be saying the
20 notes are for your personal use, so feel free to write
21 whatever you want on them, but then we're going to
22 confiscate them.

23 CHAIRMAN BABCOCK: Kent.

24 HONORABLE KENT SULLIVAN: Two quick points.
25 One is I agree with that point, that I think there needs

1 to be a clear statement about what the disposition is
2 going to be because, I mean, as a juror, I think you're
3 entitled to know where your notes are going to end up and
4 whether there's any possibility that someone else could
5 end up with them.

6 The second thing it seems to me is I will
7 say that, you know, even after a few years on the bench I
8 don't know what sort of Pandora's box we're opening up
9 here. I think it was the practice that we had that they
10 were taken up, and I think it's really worth being
11 thoughtful about that. I would be interested in what the
12 practice is in other states and the like about -- I'm not
13 used to, quite frankly, jurors walking out with their
14 notes, which is interesting.

15 I understand Richard's argument. It's funny
16 it's never -- it never came up, no one cared, quite
17 frankly, but I do think it's worth being thoughtful about
18 as opposed to just very quickly, you know, taking a vote.

19 CHAIRMAN BABCOCK: Well, to Carlos' point,
20 there's a difference between the bailiff collecting them
21 at the end of the --

22 HONORABLE KENT SULLIVAN: Right.

23 CHAIRMAN BABCOCK: -- trial and destroying
24 them and nobody reads them. That would take care of
25 personal privacy concerns. It would be quite another

1 thing if they're picked up at the end of the trial and the
2 judge has the lawyers in and said, "Okay, let's look and
3 see what these jurors are saying about us," and Dorsaneo's
4 devil-horned lawyer example comes up, so that would be
5 different.

6 PROFESSOR DORSANEO: It could hurt his
7 feelings.

8 CHAIRMAN BABCOCK: Judge Lawrence.

9 HONORABLE TOM LAWRENCE: I almost hate to
10 ask this, but is there any possibility that something in a
11 juror's notes, if the notes were not destroyed or not
12 taken -- destroyed immediately after the trial or not
13 taken with the juror, is there any possibility that
14 something in a juror's notes could somehow affect a motion
15 for new trial or an appeal? And if so, then I would -- I
16 would either want the juror to take the notes or have them
17 destroyed immediately because the longer they sit around
18 the more possibility of problems.

19 HONORABLE TOM GRAY: Yeah, don't create a
20 record to show reversible error.

21 HONORABLE TOM LAWRENCE: And I agree with
22 Levi. The last thing we want to do is have them made a
23 part of the records of the court and have to keep up with
24 them. I don't want to do that.

25 CHAIRMAN BABCOCK: Judge Yelenosky, Frank,

1 Justice Gaultney.

2 HONORABLE STEPHEN YELENOSKY: Well, I assume
3 that because people voted for the you may take notes
4 instruction that they saw a value to jurors having an
5 opportunity to take notes. Assuming there is a value, I
6 think it's destroyed by an instruction that at the end
7 we're going to take your notes because I think that will
8 discourage people from taking notes, and to what end? The
9 rare instance in which everybody thinks it's really
10 important that somebody be able to look at those notes
11 because they show some juror misconduct? I mean, we're
12 already warning them about jury misconduct. Now we're
13 making them nervous about taking notes, and they may be
14 nervous about the wrong thing, nervous about writing down
15 "This is boring," which they're perfectly free to write
16 down, so I think it just destroys the whole purpose.

17 CHAIRMAN BABCOCK: Buddy.

18 MR. LOW: But if the juror is instructed at
19 the end, they say, "Your service is over, you may discuss
20 with the lawyers or not." You may tell them, "Your notes
21 are for the purposes of this trial only. It's not to
22 write a book about or something like that. It's for
23 purposes of this trial and assist you in arriving, and
24 therefore, when this trial is over then it's over, and the
25 notes will be destroyed." I would be comforted to know

1 that my notes were going to be destroyed and nobody is
2 going to be reading them.

3 CHAIRMAN BABCOCK: Frank, then Justice
4 Gaultney.

5 MR. GILSTRAP: You know, the thought that
6 the jurors knew that their notes might be scrutinized
7 might actually help the process. They may not write
8 really extraneous stuff in the notes, and you know, I am
9 concerned about the very few high profile trials. I mean,
10 the O.J. Simpson trial, you've got Juror No. 6 who is
11 filling up a composition notebook every day and on the
12 phone to her literary agent. I mean, that can happen. Is
13 that going to skew the process? Is that troublesome
14 enough that we want to be able to take the notes up?

15 CHAIRMAN BABCOCK: I'm trying to think if
16 there's ever been a book by a juror.

17 MR. KELLY: Yes. In Pennzoil vs. Texaco.

18 CHAIRMAN BABCOCK: Pennzoil vs. Texaco.
19 There you go. Justice Gaultney.

20 HONORABLE DAVID GAULTNEY: I was just going
21 to say what Buddy said, and that is the usefulness of the
22 notes ends when the trial -- for us, for the purpose we're
23 trying to encourage, ends when the trial is over, so --
24 and the fact if we allow the notes to be taken home we're
25 not eliminating the possibility that they may be used for

1 a motion for new trial or anything else. In fact, when
2 the juror is interviewed and the notes are obtained -- so
3 I think if a juror is told that the purpose of the notes
4 is to allow you to facilitate the process, they may expect
5 to have to give up the notes at the end of the process, to
6 have them destroyed. I don't think that the notes should
7 serve any function other than what we're trying to allow
8 it to serve, that is to allow the jurors to have a memory
9 of what has happened.

10 CHAIRMAN BABCOCK: Apropos of nothing, but I
11 remember being at a seminar back in the 1970s, so even
12 before, so I guess we could be having this discussion
13 then, but the lawyer, insurance defense lawyer, said if
14 you win a case you immediately go back to the jury room
15 and empty the garbage can and take it with you so that
16 there's no notes.

17 MR. GILSTRAP: Standard operating practice,
18 go to the jury room and get rid of the notes.

19 CHAIRMAN BABCOCK: Yeah. You know, whether
20 that's apropos of anything or not, it occurred to me.
21 Judge Lawrence.

22 HONORABLE TOM LAWRENCE: Well, telling a
23 juror not to take his notes home is not going to have much
24 effect because the juror could still go home at the end of
25 the day and take voluminous notes or during lunch or break

1 and pull out a pocket notebook and take notes, so I don't
2 know that you're really preventing him from writing that
3 book anyway, so I think you ought to let him take his
4 notes home.

5 CHAIRMAN BABCOCK: Okay. I think in the
6 interest of finishing today maybe we should take a vote on
7 this issue, and I don't know which way we want to start,
8 but maybe everybody who is in favor of permitting the
9 jurors to take the notes with them at the conclusion of
10 the trial, raise your hand.

11 All those opposed to that? All right.
12 It's -- the vote is 21 in favor of allowing the jurors to
13 take the notes home and 13 against, the Chair not voting,
14 and before we get to interpreters let's take our morning
15 break.

16 (Recess from 10:31 a.m. to 10:48 a.m.)

17 CHAIRMAN BABCOCK: All right. We're back on
18 the record, and we're talking about interpreters.

19 MR. LOW: Well, the 1880 group's here.

20 MR. JACKSON: We're here, and we're ready.

21 CHAIRMAN BABCOCK: Yeah, the 1880 crowd is
22 ready to go. They're going to bed early, though. Okay.

23 HONORABLE TRACY CHRISTOPHER: Okay. The
24 next issue that came up we had actually discussed at a
25 judicial conference about a year or so ago, and so I

1 brought it up that perhaps it would be a good idea to have
2 a standard instruction regarding interpreters, and there's
3 really two schools of thought on interpreters. One is
4 tell the jury, "Listen to the English, pay no attention to
5 that other language, even if you know it." The other
6 school of thought is we don't tell them anything, and if
7 the juror listens to it in Spanish and the witness is
8 Spanish, they can, you know, do whatever they want to with
9 it. Then but in terms of this interpretation the real
10 issue was whether or not we want to let a juror who knows
11 the language somehow alert the court that the
12 interpretation is wrong.

13 Okay. So someone who is speaking Spanish,
14 he hears the witness speak in Spanish, he thinks the
15 interpreter has done a bad job, to somehow let us know,
16 and that will happen. Just about every one of us has had
17 a case where -- in Houston it's mostly Spanish, but
18 sometimes Vietnamese, where a juror will say, "That
19 translation was wrong," and they'll usually like raise
20 their hand or they'll tell the bailiff or something and
21 say, "You know, the interpreter misinterpreted the
22 testimony." So we started to discuss then whether we
23 wanted to know whether the juror was hearing the
24 interpretation differently, whether we wanted some formal
25 process where they would tell us and we would tell them,

1 "Let us know," which is actually the way they do it in
2 California and Florida, two states also that, you know,
3 have a lot of translated testimony.

4 In California they specifically said, you
5 know, rely on the translation, even if you understand the
6 language, don't retranslate any testimony, but they said,
7 "If you believe the court interpreter translated testimony
8 incorrectly, let me know immediately by writing a note and
9 giving it to the clerk or the bailiff." All right. So
10 that's how California does it.

11 In Florida it says, "You must accept the
12 English translation, disregard any different meaning, but
13 if there is a question as to the accuracy of the English
14 translation, you should bring this matter to my attention
15 by raising your hand." So we know at least in those two
16 states they do have some sort of a process where the
17 jurors would call it to our attention if they thought the
18 interpretation was wrong.

19 I did a poll of the 78 district judges in
20 Harris County, and people were evenly split on the issue
21 as to whether it was a good idea or a bad idea, so it's --
22 I mean, it's a very difficult issue. Some of the reasons
23 for the bad idea is that it could skew the whole trial of
24 the case in terms of your juror selection. All right. So
25 if you knew a witness was going to be a Hispanic you might

1 want to strike Hispanics because, "Well, Judge, I don't
2 want them retranslating and bringing it up," you know, and
3 now we're allowing them to do this, you know, under the
4 rules, or what was the other -- that was the one that was
5 most important.

6 We also had a problem with if the
7 translation -- or while I'm going to pick a Hispanic --
8 it's usually more in Vietnamese, frankly, than in Spanish
9 because most of our Spanish interpretation is pretty
10 accurate unless you get people from interior Mexico that
11 speak -- it's a little more Indian than Spanish, and so
12 sometimes our interpreters have a hard time with that
13 translation, but Vietnamese or other Asian languages are
14 constantly a source of problem for us, and I mean, if it's
15 not the parties will sit there and say to their lawyer,
16 "They're translating it wrong, they're translating it
17 wrong," and, you know, the lawyer will hop up, "They're
18 translating it wrong." I'm like "I've got no idea, this
19 is a certified translator, we have to listen to the
20 certified translator."

21 So in the case of a Vietnamese, again, it
22 could be a trial tactic that you do want the Vietnamese or
23 you don't want the Vietnamese because you think their own
24 interpretation is going to be better than the certified
25 translator, but then again, telling someone to ignore what

1 they're hearing in their own language is also a very
2 difficult concept, but those of us on the committee
3 decided that that was the better way to go. Basically,
4 you know, the English is it, and we were going to be
5 silent on, you know, calling it to our attention, and
6 people that feel strongly about it will still probably
7 mention it to us if they think the translation was wrong,
8 but we decided not to go the way of California and Florida
9 on this particular point. So that's what this
10 interpretation language is about.

11 CHAIRMAN BABCOCK: Okay. Discussion?
12 Frank.

13 MR. GILSTRAP: When someone says, like a
14 juror for example, says the interpreter is getting it
15 wrong what do you do?

16 HONORABLE TRACY CHRISTOPHER: Well, I just
17 say to them, "You have to rely on the English translation"
18 and I usually say to them, "You have to understand
19 that" -- actually, I don't ever use the word
20 "translation." I use the word "interpretation" because
21 most certified interpreters don't want you to say that
22 they are a translator because translation and
23 interpretation are two very different things. Translation
24 is sort of a word for word and often doesn't make sense
25 and interpretation is, you know, I'm taking the sentence

1 of the witness and putting it into English in a way that's
2 understandable.

3 People are certified by the state and have
4 to meet certain requirements to be an interpreter, and you
5 know, if it comes up I just say, "This interpreter is
6 certified by the state, and if you think that there was a
7 question about this particular interpretation, re-ask the
8 question in a slightly different manner to see what comes
9 up," and that's how I go with it. Because I obviously
10 don't know the correct interpretation.

11 CHAIRMAN BABCOCK: Carlos.

12 MR. LOPEZ: I think it's going to be awfully
13 hard to come up with a concise way to handle this because
14 I think Judge is right. I mean, typically the way you
15 handle -- the way I handled it was you just wire around it
16 somehow, you know. It's different if the witness or the
17 party is saying it's wrong and they're the only person in
18 the courtroom that speaks that language. It's a little
19 easier because none of the jurors speaks that language, so
20 I've had a case where I said, "You-all talk about it and
21 figure out where the disconnect is" and the witness and
22 the translator have a discussion in a different language
23 off the record. "Oh, okay, I understand what you're" --
24 and then you start over and you kind of wire around it.

25 Obviously you can't do that in front of a

1 juror who speaks that language as well. I'm assuming
2 that's a bad idea. I've never had it happen, frankly, but
3 it's an easy enough fix unless you've got a juror who is,
4 you know, watching this. I think even then you maybe can
5 take them outside somehow and fix it. I don't know how
6 you do it, because, you know, I speak Spanish so it was
7 easy for me if it was a Spanish thing, but if it's
8 Vietnamese, and they just don't -- who wins that argument?
9 The witness says "I said 'no.'" The interpreter says,
10 "No, you said 'yes,'" who is the -- I don't know how --
11 who decides that.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: Well, I like the
14 instruction that's proposed, and I think the bigger
15 problem in civil cases is that there's a very low level of
16 confidence in interpreters on the civil side because they
17 are paid for by the lawyers, and there is a wide range of
18 ability among certified interpreters, and there is the
19 perceived independence problems by the side that maybe
20 didn't bring the interpreter, and people can't afford
21 certified interpreters, and it's a big problem. And
22 really, if there were funds available that could pay a set
23 rate for an interpreter and the interpreter would be
24 appointed by the court, that would be a better solution
25 than what we have right now, because people are not

1 confident that the interpretations are faithful because
2 they think the interpreter is biased.

3 CHAIRMAN BABCOCK: Okay. Judge Peeples.

4 HONORABLE DAVID PEEPLES: Well, in San
5 Antonio and South Texas where there's such a great
6 majority of -- a lot of Hispanics, we have court, you
7 know, hired interpreters; and so I think we need to keep
8 that in mind when we're writing a rule for the whole
9 state. I think I favor Florida and California's approach,
10 which says it's okay to bring it up when it happens, and I
11 say that. Most of my experience has been in nonjury
12 cases, usually family law, with a Spanish speaker being
13 interpreted and one of the lawyers, sometimes two, are
14 fluent in Spanish, and they are very quick to say, "That's
15 not right," and I think every time it's ever happened,
16 which is a good many, they've ironed it out right there.
17 The interpreter will ask the witness, "Did you say
18 so-and-so," and they've reached consensus on what the
19 translation should be, and I think that's probably better
20 than waiting until the jury room when it's way too late
21 and we can't do anything about it.

22 CHAIRMAN BABCOCK: Richard Munzinger and
23 then Bill Wade.

24 MR. MUNZINGER: In El Paso, like in South
25 Texas, there's the majority of population is

1 Mexican-American or Hispanic. Our jurors will be
2 generally 10 of 12 jurors will be bilingual in
3 Spanish-English. It is not uncommon. We do have
4 court-appointed translators for Spanish. It is not
5 uncommon to see jurors shake their head with the
6 translation or to disagree with the translation as it
7 occurs.

8 In El Paso at least most of us, if we're not
9 bilingual, we have bilingual staff or bilingual clients,
10 and they'll tell you, "Hey, he blew that" or "she blew
11 that," whatever the case might be, and the issue comes up.
12 Personally I think you are inviting chaos if you allow
13 jurors to interfere during the trial of the case if they
14 disagree with a translation because there will be
15 disagreements among the jurors themselves as to the nuance
16 of the word or the attitude, et cetera, and there are
17 different meanings in Spanish to different words. It's my
18 belief that the word "tortilla" in Spain means omelet. It
19 doesn't mean omelet in Mexico, and in Argentina "tortilla"
20 probably means omelet as well, and there are different
21 words in Spanish the same way.

22 The last thing I would point out is this
23 rule does not address the problem where you have competing
24 translations of documents. It's not unusual and I've had
25 cases in languages other than Spanish where a document --

1 perhaps, it's a law of Honduras, for example, and a
2 regulation of the Honduran Timber Department is
3 translating. Well, the people argue over what that
4 regulation says, and sometimes the Spanish that's used is
5 quite archaic, quite formal, very difficult. Look at
6 Biblical translations. You've got the same situation.
7 This rule is silent on competing translations of documents
8 and also competing translations of hearsay testimony that
9 would be admissible otherwise. Somebody could say, "He
10 said so-and-so." Well, he didn't mean that. He meant
11 something else and you could have -- you can actually have
12 a case where you have competing translations of verbal and
13 written testimony, and this rule is silent on that issue.

14 CHAIRMAN BABCOCK: Okay. I think Bill had
15 his hand up first, Buddy.

16 MR. WADE: Well, I don't know exactly how
17 you can write something that applies all over the state
18 because it's different. In our part of the world we
19 struggle to get good interpreters. We need them. They
20 aren't always certified, and it's sometimes catch as you
21 catch can, and I am concerned that there is not some
22 method of raising a problem with the translation of the
23 testimony because those -- the interpreters, believe it or
24 not, in some parts of the state are very scarce and
25 they're not certified.

1 CHAIRMAN BABCOCK: Buddy.

2 MR. LOW: But there is a big difference in
3 somebody that translates and interprets. I had a case and
4 they would ask a question and a witness would speak for
5 three or four minutes and he would say, "He said 'yes.'"

6 MR. WADE: Exactly.

7 MR. LOW: And then you go back and the next
8 answer was "no." They say, "Well, that's what he means,"
9 so there is a difference, and I kind of wanted a
10 translator instead of an interpreter, but I didn't get it.

11 CHAIRMAN BABCOCK: Judge Patterson.

12 HONORABLE JAN PATTERSON: Well, I think all
13 of these questions of competence are a different question.
14 I do like the committee's approach. I think it's the best
15 approach. I don't think we want to invite jurors to be
16 experts on something or to differ with that translation.
17 I've dealt with numerous trials, both as a trial lawyer
18 and as a judge dealing with different translations.
19 Almost all of the problems can be taken care of with
20 cross-examination or redirect examination. I think it's
21 the province of the lawyer to figure that out and to
22 present the accurate and correct testimony.

23 It is also a problem of resources, whether
24 you have a good certified translator or interpreter, and
25 there are numerous problems, but I don't think it solves

1 anything by inviting the jury to participate as their own
2 expert.

3 CHAIRMAN BABCOCK: Okay. Ralph.

4 MR. DUGGINS: No.

5 CHAIRMAN BABCOCK: You're just scratching
6 your head, huh?

7 MR. DUGGINS: That's right.

8 CHAIRMAN BABCOCK: Okay. Any other
9 comments? Questions? Yeah, Kent.

10 HONORABLE KENT SULLIVAN: I just want to
11 emphasize Justice Bland's point because I really think
12 that's the crucial thing that people have to come to grips
13 with. We're just kicking the can down the road here, and
14 the question is the certification of the translator that
15 is the real reliability and the potential for bias. It's
16 not unlike -- it's not unlike a court reporter, quite
17 frankly. I think everybody would be a little nervous
18 about allowing one side to pay for the trial court
19 reporter. I mean, you know, it intentionally skews the
20 process of a witness just being paid for. We allow that
21 to be disclosed to the jury because it's a potential sign
22 of bias or prejudice.

23 I think the fact that, you know, the
24 translator is not necessarily benign is very troublesome,
25 and, quite frankly, although we're supposed to have

1 certified translators, number one, I think the reality --
2 which is important to take into account, I think the
3 reality is, is that trial courts do not uniformly use
4 certified people, and it is not clear to me what is
5 involved in the certification process. I have had people
6 offered up as certified translators and after the process
7 was over was less than comforted by that.

8 CHAIRMAN BABCOCK: Well, as Bill points out,
9 there is a lot of languages where, you know, translators
10 are very scarce.

11 MR. GARCIA: Chip.

12 CHAIRMAN BABCOCK: Yeah, I'm sorry, Roland.
13 Go ahead.

14 MR. GARCIA: No, I was just going to say if
15 the interpreter is getting it wrong, someone does need to
16 bring it up to the judge in some way, so there needs to be
17 an opportunity or rule to do that, and if it's just some
18 third party witness that no one knows that they need to
19 redirect or recross because of a bad interpretation, it's
20 a real travesty if the record is just wrong. So if the
21 juror is the only one who knows that then so be it, but
22 there ought to be a mechanism that it ought to be brought
23 to the attention of the judge.

24 CHAIRMAN BABCOCK: Gene and then Carlos.

25 MR. STORIE: Yeah, my only question is using

1 the term "special knowledge" in this context. I mean, if
2 you have ordinary knowledge can you talk to people about
3 what you thought you heard?

4 HONORABLE TRACY CHRISTOPHER: Okay.

5 CHAIRMAN BABCOCK: Say "special ed."
6 Carlos.

7 MR. LOPEZ: I agree a little bit with that.
8 I mean, somebody made the comment that we're inviting the
9 juror to be an expert. I don't think -- maybe, depending
10 on what the problem with the translation is, but if it's
11 just a common word and it's just been translated wrong I
12 think all we're doing is relying on the fact that that
13 juror speaks a language. That's not an expertise. I
14 mean, so I kind of agree with Roland. I think if there's
15 a problem, that don't we want to know about it? I mean,
16 what if it's important? What if -- and I've had that
17 happen where, you know, the translator said "yes" and the
18 answer was "no." I mean, that's a pretty big difference.

19 So that's one comment, and the second
20 comment was just with regard to certifications, I'll go
21 back and look if the subcommittee wants me to, but I
22 thought that there was the civil section of the Dallas
23 County DA's office, I think, and maybe the AG's office,
24 there was something about the fact that somewhere in that
25 Government Code that the question was when the parties

1 agree through a lack of a certification can they agree
2 around the need for a certification, but because there is
3 a statute in place, I don't remember where, that said
4 you're supposed to use a certified translator only.

5 HONORABLE TRACY CHRISTOPHER: Yeah, it's
6 relatively new, but there is a way to -- they're supposed
7 to be certified, but the parties can agree to use a
8 noncertified translator, and if there is no certified
9 translator available in the language then you're supposed
10 to bring it up to the judge, and the judge is supposed to
11 like interview people to see, you know, who might be the
12 best at whatever dialect we're talking about. I mean,
13 that fortunately hasn't come up for me, but I have had the
14 jurors raising their hand, and just about every one of us
15 has had a juror raise their hand and say, "That's not
16 right, Judge."

17 CHAIRMAN BABCOCK: Judge Yelenosky, then
18 Judge Lawrence, then Richard Munzinger.

19 HONORABLE STEPHEN YELENOSKY: Well, I guess
20 I think there may be an important difference between
21 "that's not right" and "it's really wrong" in the sense
22 that the witness said "yes" and perhaps they -- everybody
23 would agree or a group of interpreters would agree the
24 witness said "no," and maybe we need a linguist here to
25 tutor us on this, but even in English, of course, we all

1 apply interpretive overlay to anything that's said.

2 It could be the same language. You say, you
3 know, "tortilla" means this in Mexico and it means that in
4 Spain. Well, you know, "boot" means something different
5 in English in England than it does in the United States,
6 so and "lift," an elevator. So even in the same language,
7 but even among ourselves we apply certain interpretation.
8 We could disagree about whether something is really red or
9 whether it's mauve or whatever. So I'm not sure, you
10 know, maybe it's gray, but what we're concerned about is
11 where "yes" is "no," and we don't want jurors standing up
12 every time and saying, "Well, you know, he really said
13 'taco,' not 'tortilla,'" because it doesn't really matter
14 so much, and so I think there is some concern that you're
15 going to have -- your concern was, Richard, that people
16 would be raising their hands every other time and
17 disagreeing among themselves.

18 Other people's concern is, well, we don't
19 want that, but we also don't want jurors going back
20 knowing they said "no" and they're told to believe he said
21 "yes," and I don't know how to fix that, but I see those
22 as two different things.

23 CHAIRMAN BABCOCK: Okay. Judge Lawrence,
24 then Richard Munzinger, then Skip.

25 HONORABLE TOM LAWRENCE: I've never had a

1 juror raise their hand and say that the interpreter got it
2 wrong, but I frequently have one of the parties or an
3 attorney say that, and I think the prime consideration is
4 that the interpretation needs to be right, that we need to
5 understand the meaning that was given in the testimony, so
6 I would be in favor of a fairly liberal instruction that
7 would ensure that that occurs.

8 CHAIRMAN BABCOCK: Okay. Richard.

9 MR. MUNZINGER: May I ask the committee a
10 question? Isn't there a statute that the translator or
11 interpreter has to take an oath and the oath is
12 prescribed?

13 HONORABLE TRACY CHRISTOPHER: Yes.

14 MR. MUNZINGER: Does the oath use the word
15 "interpret" --

16 HONORABLE TRACY CHRISTOPHER: Yes.

17 MR. MUNZINGER: -- or "translate"?

18 HONORABLE TRACY CHRISTOPHER: Interpret.

19 MR. MUNZINGER: It uses the word
20 "interpret."

21 HONORABLE TRACY CHRISTOPHER: Yes.

22 CHAIRMAN BABCOCK: Skip and then Carlos and
23 then Bill.

24 MR. WATSON: I want to speak I think to the
25 second half of what Judge Yelenosky was saying. I don't

1 see a difference between a discussion in the jury room
2 over whether the person said, "I was not there" or "I was
3 there" when someone coughed when the word "not" was said
4 and a vigorous discussion in the jury room about what was
5 said in English being any different than a discussion
6 over -- between jurors over what was said in Spanish. It
7 seems to me like the translation is for the benefit of the
8 people who don't understand that language, and it's for
9 the appellate lawyers' and the appellate judges' benefit,
10 but I could sure see a situation where if the court
11 reporter were to be called in in a case in English and I
12 was convinced that I heard "not" being said and it didn't
13 get into the record, I would be concerned that there
14 wouldn't be a way to fix that before it got to the jury
15 room and get everything together, and I would expect the
16 jurors at a minimum to be able to disagree with what the
17 court reporter got down.

18 CHAIRMAN BABCOCK: Okay. Carlos and then
19 Bill Dorsaneo.

20 MR. LOPEZ: Skip actually just brought up
21 the point I was going to make, which is it's also a
22 question of the record, not just what the jury hears and
23 gets their decision right. I've had a case where the
24 interpreter said "25" and the answer was 15, and the two
25 Hispanic jurors on the jury looked at me and went, and I

1 tried to put my stone face on. It was obvious that they
2 knew what they had heard and were getting it right. The
3 only thing that was wrong was the record. When it got
4 interpreted back the record said "25," but the witness had
5 said "15."

6 CHAIRMAN BABCOCK: Well, could you have
7 said, you know, in Spanish, "Did you mean 25 or 15, I
8 didn't hear it?"

9 MR. LOPEZ: I could have, and I'm trying to
10 remember if I have. I mean, it doesn't come up that
11 often. Thankfully we've got pretty good interpreters in
12 Dallas, but it's a record issue, too, not just did the
13 jury -- accuracy of what the jury hears, but how about
14 it's an accuracy of what the record reflects if, in fact,
15 it's an important issue, and as a trial judge I've made
16 mistakes before on what I thought was an important issue
17 in the trial and the court of appeals thought a different
18 issue was an important issue.

19 HONORABLE STEPHEN YELENOSKY: That's even
20 another element, where the judge speaks Spanish.

21 CHAIRMAN BABCOCK: Yeah. Yeah.

22 HONORABLE STEPHEN YELENOSKY: Because we're
23 allowed to clarify if somebody obviously misstates and
24 says "1984" and you -- I mean, you might say, "Did you
25 mean 1994" because the person wasn't born before then or

1 something. Can the judge who speaks Spanish say, "Did you
2 mean 15?"

3 MR. LOPEZ: Well, or in English like you
4 just said. The witness says -- we've all seen a witness.
5 They're reading a document. They read from this document,
6 and they read it and it says "1988" and the witness says
7 "1986." That happens in English, right? What do we do?
8 I mean, you know, a lot of times I just sit back and say
9 maybe that's the lawyer's --

10 CHAIRMAN BABCOCK: And the jurors should
11 have been allowed to take notes back then, too.

12 MR. LOPEZ: If the lawyer speaks the
13 language I say it's the lawyer's job to pay attention, but
14 if it's a different language --

15 PROFESSOR DORSANEO: Does anybody else do
16 this official interpretation approach you've come up with?

17 HONORABLE TRACY CHRISTOPHER: Oh, yes. I
18 didn't do a complete survey of states, but there are
19 California, Florida, Pennsylvania, Delaware, Minnesota,
20 Hawaii, Washington, Alabama, all have a similar type
21 instruction, English is the official interpretation,
22 listen to the English. Only California and Florida had
23 the if you hear something different let me know about it,
24 and my guess is because it happens more often in
25 California and Florida, given the composition of those two

1 states, just like ours.

2 PROFESSOR DORSANEO: Do they all say you
3 have to follow the official interpretation --

4 HONORABLE TRACY CHRISTOPHER: Yes. They all
5 say that.

6 PROFESSOR DORSANEO: -- even if you speak
7 Greek --

8 HONORABLE TRACY CHRISTOPHER: Uh-huh. Yep.

9 PROFESSOR DORSANEO: -- and that was not
10 what the witness said?

11 HONORABLE TRACY CHRISTOPHER: Yeah. It
12 says, you know, "All jurors consider the same evidence.
13 You must base your decision on the evidence presented in
14 English. You must disregard any different meaning of the
15 non-English words." They all have that in their pattern
16 instruction.

17 MR. LOPEZ: Which is why it should be --

18 PROFESSOR DORSANEO: I find that very -- I
19 find that to be very troubling, and I don't think I could
20 do it if I was on the jury and if I knew that somebody
21 said one thing and the interpreter misinterpreted it. I
22 don't -- I don't even think it makes any sense to tell
23 people that they have to substitute what they actually
24 heard the witness -- for what they actually heard the
25 witness say what somebody interpreted.

1 HONORABLE TRACY CHRISTOPHER: Well, there
2 are a couple of judges that felt that way, too, that, you
3 know, we can't tell somebody to turn off their
4 understanding of the Spanish.

5 MR. LOPEZ: We tell the engineers on the
6 jury to disregard what they know and go with what the
7 expert said, I mean, and they don't do it.

8 CHAIRMAN BABCOCK: Frank.

9 MR. GILSTRAP: I'm troubled by it, too, but
10 what's the alternative? What's another way to do it? I
11 mean, that's why I asked the first question, what do you
12 do when somebody says, "Well, no, that's not the right
13 translation?" And nobody knows. Are you going to tell
14 the jurors, "Well, you know, if you heard it differently,
15 you follow that -- follow that"? I mean, I don't know.
16 What do you do?

17 PROFESSOR DORSANEO: I don't think this is a
18 special knowledge problem. You know, like special
19 knowledge of --

20 CHAIRMAN BABCOCK: Engineering.

21 PROFESSOR DORSANEO: -- engineering. I
22 think that this is a situation where we just ought to let
23 it happen, whatever happens.

24 CHAIRMAN BABCOCK: Justice Gray and --

25 PROFESSOR DORSANEO: And let's go to El Paso

1 and have ten people on the jury who speak Spanish, and
2 they all think that the interpretation that they were
3 given is wrong. Now, it's going to be corrected in El
4 Paso presumably because of the parties, but it just
5 doesn't -- maybe I don't like the whole idea of official
6 interpretation, like the government is going to be telling
7 me what the truth is. I don't like that. That's
8 un-American.

9 CHAIRMAN BABCOCK: You and Munzinger go
10 outside and talk.

11 HONORABLE STEPHEN YELENOSKY: Let your red
12 flag fly.

13 MR. MUNZINGER: That a boy, Bill.

14 CHAIRMAN BABCOCK: Justice Gray and then
15 Kent.

16 HONORABLE TOM GRAY: According to my notes
17 Frank wants to know what do you do and according to my
18 notes Carlos says it doesn't come up that often, and it
19 seems to me that we're trying to grapple with a problem
20 that the trial judges seem to be handling pretty well now
21 and document it in a rule, and I don't see a -- I mean,
22 we've had a couple of interpreter certification questions
23 come up and -- but it seems to me that you-all are
24 handling it pretty good as trial judges, and this
25 interjects a whole other layer of problems in it. I mean,

1 I bet you Buddy could get you an expert in East Texas
2 dialect, or maybe some Cajun, you know --

3 MR. LOW: No, they're French, and the real
4 France and the Cajun --

5 HONORABLE TOM GRAY: I mean, there's got to
6 be all kind of problems that trial judges in East Texas
7 deal with everyday. South -- I mean, it just seems to me
8 that we're trying to write a rule that comes up for trial
9 judges to be able to have some discretion to deal with on
10 the fly. I understand there can be problems and issues
11 that come up, but it seems like they're handling it pretty
12 well. I just don't think we need a rule that gets off
13 into this at all.

14 CHAIRMAN BABCOCK: Kent. And then Judge
15 Christopher.

16 HONORABLE KENT SULLIVAN: The objection that
17 I have to Professor Dorsaneo's point is the state of the
18 record. I mean, what he said made complete sense. It is
19 common sense that jurors are not going to ignore and
20 qualitatively it's counterintuitive for us to want to ask
21 them to ignore what they heard. The problem that I think
22 we've got to deal with and the reason I think it is worth
23 talking about is the fact is the record is what the
24 translator said. It's like what the court reporter takes
25 down. There is in essence an irrebuttable presumption or

1 virtually irrebuttable that what the court reporter
2 recorded are the facts, and if you have a court reporter
3 who consistently gets things wrong, you've got a real
4 problem.

5 A translator becomes in some measure a part
6 of that process because those are what the facts are, and
7 that's why I think, to the point I tried to make earlier,
8 this question of certifying the translator and trying to
9 ensure that the translator is benign is not
10 inconsequential in cases where the translation plays a
11 central role.

12 CHAIRMAN BABCOCK: Okay. Judge Christopher.

13 HONORABLE TRACY CHRISTOPHER: Well, this
14 happens all the time. I mean, we have translated
15 testimony in 25 percent of our trials in Harris County;
16 and I'm sure they've got it in, you know, 95 percent of
17 their trials in other parts of the state; and jurors ask
18 questions about it during voir dire; and so I think it
19 would be good to have sort of a standard instruction; and,
20 I mean, it's one thing that lawyers voir dire about a lot
21 when you have someone that's going to testify through a
22 translator, especially if it's a party as opposed to a
23 witness in the case. I mean, you know, you've got a lot
24 of -- in Harris County at least, we've got a lot of bias
25 against people who don't speak English, and so, you know,

1 that comes out and even when I say, "Oh, we're going to
2 have official interpretation," and blah-blah-blah, you
3 know, they don't care about that, and I would like to have
4 something -- I would like us to be uniform in our approach
5 to it, so that's --

6 HONORABLE TOM GRAY: But, see, she's made my
7 case for me that it happens and our capable trial judges
8 are dealing with it.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: I think what we
11 have in the proposal is different from what we tell jurors
12 in the standard instructions that they're supposed to do
13 with their special knowledge. This proposed rule says not
14 only you can't tell any other jurors, you can't use your
15 own knowledge of Spanish, but Rule 226a says, "Do not tell
16 other jurors your own special knowledge." It doesn't say
17 you can't use it if you know something about medicine or
18 engineering or business or whatever. It says to tell the
19 other jurors is the violation, and I just -- that's first,
20 we do not instruct jurors "You cannot use your special
21 knowledge." We simply tell them you can't relate it to
22 other jurors, but here it's you can't use it or tell
23 anybody.

24 I'm not sure -- I mean, I agree with Bill
25 Dorsaneo. If I were bilingual and understood what a

1 witness said, for somebody to tell me I've got to
2 disregard it, that's asking a heck of a lot, I think.

3 CHAIRMAN BABCOCK: Judge Patterson.

4 HONORABLE JAN PATTERSON: What the jury
5 hears and does I think is a separate question from the
6 record, although I think they are both problems, because
7 what's happening now is that after the fact, after the
8 jury or when you get daily copy somebody sees that there
9 are problems with the record, and the court reporter has a
10 recorded version, so then the question arises whether
11 those can be compared, and that becomes a separate problem
12 from what the jury is hearing, but I think that they are
13 all definitely problems, but different ones.

14 CHAIRMAN BABCOCK: Okay. Yeah, Bill.

15 PROFESSOR DORSANEO: So I gather some of the
16 trial judges don't do it this way. Judge Christopher, I
17 guess some of the judges don't do it this way?

18 HONORABLE TRACY CHRISTOPHER: Some of them
19 don't.

20 PROFESSOR DORSANEO: But this is the way you
21 like it?

22 HONORABLE TRACY CHRISTOPHER: Well, this was
23 my suggestion.

24 PROFESSOR DORSANEO: Okay.

25 HONORABLE TRACY CHRISTOPHER: This is the

1 committee's suggestion, but I'm bringing up the issues in
2 case this group feels differently about it. I mean, like
3 I said, it was 50/50 in Harris County judges on just the
4 idea of whether the juror should bring it up, and a lot of
5 people, you know, voiced the same sort of thing. Well,
6 you can't really tell a Spanish speaker to turn off, you
7 know, what they're hearing.

8 HONORABLE JAN PATTERSON: Well, and what was
9 the question raised, though, because I think it is a
10 different question as to whether there are a variety of
11 interpretations or whether somebody is just getting
12 something saying "yes" when it's "no." I mean, these are
13 different things.

14 CHAIRMAN BABCOCK: Sure.

15 HONORABLE TRACY CHRISTOPHER: Well, there
16 was some thought that, you know, if you hear something
17 that's substantially different or materially different,
18 you know, let us know versus, you know, something that's
19 not important whether it really was an omelet or a
20 tortilla. Although that could be material in some cases.

21 CHAIRMAN BABCOCK: It was a tortilla, but
22 was it an omelet or a tortilla? Would it be helpful,
23 Judge Christopher, to see the sense of the committee as to
24 whether or not they think we need a rule at all?

25 HONORABLE TRACY CHRISTOPHER: Sure.

1 CHAIRMAN BABCOCK: Okay. Everybody that
2 thinks, as Justice Gray said, we don't need a rule at all,
3 raise your hand.

4 Everybody that thinks we do need a rule
5 raise your hand. Well, the anti-rule forces have 16 and
6 the pro-rule forces have 12.

7 HONORABLE TOM GRAY: Would you repeat that
8 to make sure that that got on the record that I was in the
9 majority on that?

10 CHAIRMAN BABCOCK: Justice Gray's position
11 prevails by the slender vote of 16 to 12.

12 HONORABLE TOM GRAY: I would have been in
13 the majority if I would have had one more vote on every
14 one of those cases.

15 HONORABLE STEPHEN YELENOSKY: We didn't
16 count the superdelegates.

17 CHAIRMAN BABCOCK: That's true. We have not
18 counted the superdelegates yet, but for now you're a
19 winner. So I think that we ought to be guided a little
20 bit by the Court's view on whether or not we should
21 continue taking votes on -- if the Court overrules Justice
22 Gray, which occasionally happens, we should continue
23 discussion on what the rule should look like. For
24 example, I'd be interested to know that if we have a rule
25 whether people think that the California/Florida approach

1 about jurors raising their hands saying, "I've got a
2 problem" ought to be in there. Do you agree with that?

3 HONORABLE DAVID PEEPLES: Well, I think what
4 they said was "write me a note," wasn't it?

5 HONORABLE TRACY CHRISTOPHER: Yes.

6 HONORABLE DAVID PEEPLES: There's a big
7 difference between "raise your hand" because to have to
8 write a note is going to filter out the insignificant
9 differences, which is good.

10 CHAIRMAN BABCOCK: Yeah. Yeah.

11 HONORABLE DAVID PEEPLES: If somebody wants
12 to go to the trouble to write a note then it's probably
13 important.

14 HONORABLE TRACY CHRISTOPHER: Well, let's
15 see, California says "write a note," and Florida says
16 "raise your hand."

17 MR. LOW: But when would you give it? Would
18 you give it right during the trial or at a recess or when?

19 HONORABLE TRACY CHRISTOPHER: They both say
20 immediately, let me know immediately.

21 MR. LOW: Okay.

22 HONORABLE TOM GRAY: Well, this would take
23 care of our early morning discussion on whether or not
24 they can take notes.

25 CHAIRMAN BABCOCK: They're going to be

1 taking a note right away.

2 HONORABLE TRACY CHRISTOPHER: I'm pretty
3 sure they must be note-taking states.

4 CHAIRMAN BABCOCK: Let's get a sense of our
5 committee as to whether or not we think -- regardless of
6 the mechanics, whether you write a note or raise your
7 hand, whether that should be included in a rule if we have
8 a rule. Okay. So everybody that thinks the
9 California/Florida approach should be included in any rule
10 that we have, raise your hand.

11 HONORABLE TOM LAWRENCE: For jurors only
12 you're talking about?

13 CHAIRMAN BABCOCK: For jurors, right. Wait
14 a minute.

15 All those opposed? The court reporter.

16 MR. JACKSON: The court reporter.

17 HONORABLE STEPHEN YELENOSKY: Can we have a
18 third category?

19 CHAIRMAN BABCOCK: The vote is 26 in favor,
20 4 opposed, although the court reporter's vote may be
21 weighted, so it may be closer than what we thought. Judge
22 Yelenosky.

23 HONORABLE STEPHEN YELENOSKY: Can I just
24 vote -- I think we have to move on, but just vote that I
25 don't know. I think it's a really hard problem, and I

1 would like to think more about it and know more if I were
2 to vote one way or the other. I think it's a difficult
3 issue.

4 CHAIRMAN BABCOCK: Okay.

5 MR. GARCIA: Overruled.

6 CHAIRMAN BABCOCK: So Judge Yelenosky
7 registering his ambivalent vote.

8 HONORABLE JAN PATTERSON: Is there any
9 insight from the court reporters? Because I do think that
10 there are two segments here, the interpreters and the
11 court reporters, who have opportunities, responsibilities,
12 and insights.

13 MR. JACKSON: I can just see the trial
14 getting interrupted by someone seeking their 15 seconds of
15 glory by pointing out that something was interpreted
16 wrong, and it's not really that relevant, and, you know,
17 you're going to have jurors that are going to try that.
18 You know, "Ooh, ooh, ooh, that was wrong," and if you're
19 responsible for keeping track of everything that's going
20 on in the trial as the court reporter and you've got
21 jurors now participating in the discussion, I think you're
22 going to get --

23 HONORABLE JAN PATTERSON: And have court
24 reporters ever brought it to a judge's attention that this
25 is a faulty interpreter? I mean, that happens.

1 MR. JACKSON: No, but we -- I have the same
2 experience with that that Buddy has. You know, you'll
3 have a witness that will answer a question for five
4 minutes and the interpreter will say "yes." You know,
5 that happens a lot, but, I mean, I'm no more competent to
6 determine whether the interpreter got it right than anyone
7 else.

8 CHAIRMAN BABCOCK: Okay. Great. Let's move
9 on to jury panel's oath and juror oath, if -- Judge
10 Christopher, if that's the next point.

11 HONORABLE TRACY CHRISTOPHER: This is on
12 page five of my memo. These are not actually -- we don't
13 consider these substantive changes, but since it is actual
14 oaths to the jury I thought I'd bring it to your attention
15 that we were hoping to simplify both of them. Rule 226 is
16 the jury panel oath, and Rule 236 is the oath that we
17 actually give jurors, and you see the current version of
18 the oath versus what we would prefer to change it to. I
19 don't think we've done anything substantive to either one,
20 but I wanted you all to look at these in case you thought
21 we had.

22 MR. LOW: What were you trying to correct?

23 HONORABLE TRACY CHRISTOPHER: Well, just
24 read these things. "Do you and each of you solemnly swear
25 that in all cases between parties which shall be submitted

1 to you" --

2 HONORABLE DAVID PEEPLES: "To you
3 submitted."

4 HONORABLE TRACY CHRISTOPHER: "To you
5 submitted." I mean, no one understands what they're
6 swearing to.

7 MR. LOW: Okay. Just language and
8 interpretation.

9 HONORABLE TRACY CHRISTOPHER: Yeah, that's
10 all.

11 CHAIRMAN BABCOCK: I like the phrase "you
12 will a true verdict render." I think that's --

13 HONORABLE TRACY CHRISTOPHER: Well, okay,
14 now, our plain language guy didn't want to keep "you will
15 render a true verdict," but we said, you know, lawyers
16 will come out, "You're rendering a true verdict" all the
17 time. It's like their favorite part of the oath, that
18 "You have just taken an oath that you will a true verdict
19 render," so we left it in, because it has so much history.

20 HONORABLE STEPHEN YELENOSKY: That's the
21 mimeograph generation.

22 CHAIRMAN BABCOCK: Yeah, right. Judge
23 Lawrence.

24 HONORABLE TOM LAWRENCE: I like the change
25 to Rule 236 because we've got a problem in JP court. We

1 don't have a charge to the jury in civil cases, so I'm
2 always explaining to the lawyers that there's no charge in
3 a civil case and then the jurors are sworn in and it says,
4 "such as charged by the Court," and the lawyers, "But,
5 Judge, you just said," so I would like to have that taken
6 out. That's confusing for us.

7 HONORABLE TRACY CHRISTOPHER: Well, and we
8 also thought that most people have no idea what the charge
9 of the court is until it's actually read to them at the
10 end of the trial, so that's why we put in "according to
11 the law."

12 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Well, I was
14 joking about that, but if you're asking somebody to make a
15 serious commitment to something they ought to know what
16 they're committing to, and I don't care if lawyers like it
17 or not, people don't know what a true verdict is.

18 HONORABLE JAN PATTERSON: Uh-oh.

19 HONORABLE STEPHEN YELENOSKY: Well, I mean,
20 if you're saying "You will render a verdict according to
21 the law as instructed by the Court and the evidence," that
22 makes sense, but what does "true" add to that?

23 MR. WATSON: Mystery.

24 HONORABLE TRACY CHRISTOPHER: History.

25 CHAIRMAN BABCOCK: Judge Peeples.

1 HONORABLE DAVID PEEPLES: Let me say, first
2 of all, I have done something like this rewrite for 20
3 years. It just needs to be done, and I've just always
4 thought "true verdict" is defined by what comes after
5 that. We don't say it that way, but you'll render a true
6 verdict or a correct verdict, which is a verdict according
7 to the law and based upon the evidence.

8 HONORABLE STEPHEN YELENOSKY: Well, then
9 it's superfluous.

10 CHAIRMAN BABCOCK: But it sounds good.

11 HONORABLE DAVID PEEPLES: And can I just
12 make a second point? I wanted to ask Tracy why -- if
13 "according to the law," it seems to me, is not as strong
14 as "the law as it will be given to you in the court's
15 charge," and usually by this point they've heard something
16 about the court's charge, and I'm not saying --

17 HONORABLE STEPHEN YELENOSKY: Except for JP
18 court.

19 HONORABLE TRACY CHRISTOPHER: No, because
20 this is right at the beginning. Most people don't know
21 what a court's charge is.

22 HONORABLE DAVID PEEPLES: This is the 12
23 that are being sworn in.

24 HONORABLE TRACY CHRISTOPHER: Yeah, right at
25 the beginning of the trial.

1 HONORABLE DAVID PEEPLES: A lot of the time
2 they've heard something about the charge. As a matter of
3 fact, I think it's in 226a, isn't it? But I just think
4 that strengthens it to say the law is going to be in the
5 charge.

6 HONORABLE STEPHEN YELENOSKY: Except for JP
7 court. They need to be able to take that out.

8 CHAIRMAN BABCOCK: Okay. Yeah, Justice
9 Bland.

10 HONORABLE JANE BLAND: I like leaving "true
11 verdict" in because I think it preserves a little bit of
12 the solemnity of the oath that you want people to know
13 this isn't any old promise you're making, and it sort of
14 gives it a little bit of a solemnness that might not be
15 there otherwise, and you could say "according to the law I
16 give you," if you -- I think the court's charge, people
17 don't know what that is, but if you want to clarify that
18 the law is not just any old law, but it's the law that I
19 give you that you're governed by then you could change it
20 to say, "You will render a true verdict according to the
21 law I give you and the evidence given you, so help you
22 God."

23 CHAIRMAN BABCOCK: Yeah, I made this
24 observation a couple of meetings ago, but the counterpoint
25 to the plain language guys, there have been some research

1 done that jurors give more weight to kind of antiquated
2 type legal language. They think, "Ooh, this is really
3 serious because it sounds like a legal thing" as opposed
4 to a plain everyday kind of thing, for whatever that's
5 worth.

6 HONORABLE JANE BLAND: Just like wedding
7 vows.

8 CHAIRMAN BABCOCK: Just like that.

9 HONORABLE JANE BLAND: You know, a lot of
10 those are still preserved and you think, well, why haven't
11 those gotten -- you know, some people write their own, but
12 a lot of people just do the traditional old-fashioned
13 vows.

14 HONORABLE STEPHEN YELENOSKY: And, boy,
15 those sure are working.

16 HONORABLE TRACY CHRISTOPHER: Did you pledge
17 your troth?

18 HONORABLE JANE BLAND: Hey, they work more
19 than half the time.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: I would question why they went to
22 the term "evidence" rather than to "the evidence submitted
23 to the jury under the rulings of the court." I mean,
24 "evidence" broadly could mean, you know, something is
25 inadmissible and it's brought up, but the court's ruled

1 that you can't consider it. Well, is that evidence?

2 CHAIRMAN BABCOCK: May be inadmissible
3 evidence, but it's still evidence.

4 MR. LOW: Yeah. And I don't know why you
5 get away from what the evidence that's submitted to them,
6 not just evidence of the world, but the evidence that's
7 submitted in this case under the rulings of the court. I
8 don't know how you improve on that.

9 CHAIRMAN BABCOCK: Kent, where do you come
10 out on this?

11 HONORABLE KENT SULLIVAN: On this? With
12 Judge Christopher.

13 CHAIRMAN BABCOCK: Okay. Any other
14 comments? Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: I think we
16 talked about this a little time. Is there a difference
17 between "swear or affirm," and if so, what is it, and if
18 "affirm" is there for people who don't want to make what
19 they consider to be a religious vow then we frustrate that
20 by the end of the sentence, so why do we do it that way,
21 and I don't understand.

22 MR. GILSTRAP: Well, no, no. The
23 prohibition against affirmance is not that it's -- that
24 they don't believe in God. It's that they don't believe
25 in swearing.

1 MR. JACKSON: Right. There's a passage in
2 Matthew about that.

3 MR. GILSTRAP: There's a difference.

4 HONORABLE STEPHEN YELENOSKY: Well, yeah,
5 I'm open to explanation. -I didn't know. What is -- they
6 don't believe in swearing, but they're okay with
7 affirming?

8 MR. GILSTRAP: Yeah. Yeah.

9 HONORABLE STEPHEN YELENOSKY: And then the
10 oath has to be modified if somebody objects on religious
11 grounds.

12 MR. GILSTRAP: Apparently there's some way
13 you can read some part of the Bible that you're not
14 supposed to take an oath, you see. It's based on a
15 religious --

16 HONORABLE TOM GRAY: The assumption being
17 that you don't break the commandment that "thou shalt not
18 lie" to begin with.

19 HONORABLE STEPHEN YELENOSKY: Right, but we
20 don't accommodate those people who don't want to swear "so
21 help you God" in the standard swearing.

22 MR. GILSTRAP: Yeah, but that's another
23 issue.

24 HONORABLE STEPHEN YELENOSKY: True. For
25 some people a more important issue than saying they don't

1 want to swear.

2 CHAIRMAN BABCOCK: Nina.

3 MS. CORTELL: I guess a couple of thoughts.

4 One, I do agree with taking "true" out. If we're going to
5 fix it and go to modern language it just seems to me you
6 would take "true" out and delete the comma, but I think
7 that might be a minority view.

8 My question is to the trial judges, is the
9 reference to God ever been a problem in any trials, and
10 I'm kind of surprised we haven't had any discussion on
11 that aspect.

12 CHAIRMAN BABCOCK: Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: I can tell you
14 the practice in Travis County is not to use it.

15 HONORABLE LEVI BENTON: Not to use God?

16 MR. KELLY: That explains Travis County.

17 HONORABLE LEVI BENTON: That explains Travis
18 County.

19 HONORABLE STEPHEN YELENOSKY: Well, I can't
20 speak for the criminal side, but I think it's fairly -- I
21 can't speak for judges, but I understand it's fairly
22 common.

23 HONORABLE LEVI BENTON: I take my crucifix
24 out and my -- no, my cross out, excuse me.

25 HONORABLE STEPHEN YELENOSKY: I do not use

1 it in my court.

2 HONORABLE LEVI BENTON: I'm kidding.

3 CHAIRMAN BABCOCK: Yeah, Bill.

4 PROFESSOR DORSANEO: I don't -- I frequently
5 don't like plain language. Part of the current version of
6 the oath that I think is goofy is the, you know, beginning
7 part. I don't like "true" either, but I don't have any
8 problem with "according to the law as it may be given you
9 in the court's instructions and evidence submitted to you
10 under rulings of the court." I don't have a problem with
11 that, and I would take "so help you God" out of it, too,
12 because that is offensive to a lot of people, and I don't
13 think -- I don't think it's really necessary.

14 CHAIRMAN BABCOCK: Okay. Kent.

15 HONORABLE KENT SULLIVAN: Just a brief word
16 about plain language, because Judge Christopher and I
17 grapple with it in connection with this committee's work.
18 To me plain language is not meant to be modern language.
19 I don't think that's what you're driving at at all. When
20 we use the term -- or I'll just speak for myself. When I
21 use the term "plain language" it is simply using language
22 which taken in context, taken as a whole, you know there
23 is a very high likelihood that the jurors, the users, will
24 actually understand it. That's all. And in some cases,
25 as the Chair pointed out, sometimes using some more

1 traditional language --

2 CHAIRMAN BABCOCK: Arcane.

3 HONORABLE KENT SULLIVAN: -- even antiquated
4 language, as long as it is clearly explained, may be
5 better in terms of the ultimate impact on the jurors. It
6 is not -- it's not an attempt to speak in, you know,
7 modern language or slang or anything like that. I just
8 think it's worth noting that.

9 CHAIRMAN BABCOCK: Okay. Judge Christopher.

10 HONORABLE TRACY CHRISTOPHER: The "so help
11 you God" has been in both of these oaths, has been in the
12 rule. I have never had a jury panel or -- the venire
13 panel or the jury panel, I've never had anyone complain
14 about it or say, "I won't." The oath that we give
15 witnesses to tell the truth is -- and I was looking for
16 it. I don't think it's in the rule book. It was what
17 judges are given in the bench book, which is kind of like
18 this little primer on how to do everything, and it started
19 out with "do you swear or affirm" and concludes with, you
20 know, "so help you God" in brackets, all right, which
21 allows individual judges to not add "so help you God" if
22 you don't want to. And I think there's also a little
23 instruction that says, you know, if you have people of
24 different faiths who, you know, might not want to do this,
25 you should kind of figure that out ahead of time before

1 you ask somebody to swear to God.

2 So that's how it's handled in terms of the
3 oath to the witness, and occasionally we'll have a witness
4 when you say, "Do you swear or affirm, so help you God,"
5 they'll say something like, "I affirm on," you know, "my,"
6 you know, "honor as a person."

7 HONORABLE STEPHEN YELENOSKY: Well, the
8 problem with when you're addressing the venire or the 12
9 is you don't have an opportunity or they don't really have
10 a real opportunity to stand up because you walk in and
11 say, "While you're still standing let me" -- you know.

12 HONORABLE TRACY CHRISTOPHER: No, I agree,
13 you know, 12 people are less likely to complain than one
14 person.

15 CHAIRMAN BABCOCK: Yeah, just historically
16 isn't it true in Federal court that you always start court
17 by the bailiff saying, "God bless these United States
18 and" --

19 MR. GILSTRAP: "God save the United States
20 and this honorable court."

21 CHAIRMAN BABCOCK: Yeah. Whatever.

22 HONORABLE STEPHEN YELENOSKY: I think the
23 Supreme Court has upheld those kind of references. I'm
24 not making a constitutional argument, at least not unless
25 the person objects, but I'm making an argument.

1 CHAIRMAN BABCOCK: Yeah. Gotcha. Okay.
2 Why don't we -- why don't we take a vote on whether the
3 sense of the committee is that we should change these two
4 rules with respect to the language both of 226 and 236.
5 Everybody in favor of changing, raise your hand.

6 Everybody opposed?

7 MR. GILSTRAP: Same three.

8 CHAIRMAN BABCOCK: By a vote of 27 to 4, the
9 Chair not voting, the proponents of change have prevailed,
10 and I think, Jody, the discussion has probably been
11 sufficient to -- he's not listening, but I think the
12 discussion has been sufficient to inform the Court as to
13 what the issues are, so let's go to the next -- Judge
14 Patterson.

15 HONORABLE JAN PATTERSON: Except I would
16 like to make a pitch for the comments that have been made
17 that perhaps the only changes that should be made are to
18 take out the reference to "between the parties, which
19 shall be to you submitted," and "in the charge," because I
20 really do like the current version, and I think whether it
21 has solemnity or meaning to the parties I think it is
22 plain language and is understandable, but I think it could
23 be tinkered with. "Do you solemnly swear or affirm" and
24 then take out that next phrase and then "in the charge"
25 also take out, but I want to make a pitch for the current

1 one and maybe take out "so help you God." I think that
2 ought to be considered. I'm not sure that's necessary at
3 this point.

4 CHAIRMAN BABCOCK: Okay. Judge Christopher,
5 direct and indirect evidence.

6 HONORABLE TRACY CHRISTOPHER: That's page
7 six. If I remember correctly I think, Alex, we asked them
8 about whether they understood circumstantial evidence.

9 HONORABLE JAN PATTERSON: Lawyers or jurors?

10 HONORABLE TRACY CHRISTOPHER: Jurors.

11 PROFESSOR ALBRIGHT: I think this was just
12 one -- I can't really remember. This wasn't as big of a
13 deal as preponderance of the evidence.

14 HONORABLE TRACY CHRISTOPHER: I was trying
15 to -- this -- what we've done here is change the
16 definition of "circumstantial evidence," which is
17 routinely given as part of the boilerplate language in the
18 charge. It's not actually currently in 226a.

19 PROFESSOR DORSANEO: No, it's not.

20 PROFESSOR ALBRIGHT: It's an option. It's
21 an option.

22 HONORABLE TRACY CHRISTOPHER: But most
23 people put it in every single one of their charges. I
24 mean, it's in the beginning instructions in the pattern
25 jury charge, and if you don't put it in there almost

1 everyone asks, "Oh, Judge, we need the circumstantial
2 evidence instruction in there," so, I mean, for most of us
3 we've included it in our boilerplate just as a matter of
4 course and don't wait for someone to actually ask for that
5 particular instruction.

6 So we thought it needed modernizing to
7 direct and indirect evidence, which is how it's described
8 in many states that have tried to modernize their jury
9 charges. I don't have all of the ones that we relied upon
10 to get this particular language, but direct and indirect
11 is the more modern version of circumstantial evidence.

12 CHAIRMAN BABCOCK: Judge -- Judge Dorsaneo.
13 You've now been elected to the bench.

14 PROFESSOR DORSANEO: I don't like this
15 modern version. I've never used the term "indirect
16 evidence" in teaching direct and circumstantial evidence
17 for way too long. I don't like the definition of indirect
18 evidence either, because I think really the circumstantial
19 evidence is the evidence that you would draw inferences
20 from, not the inferences themselves, so I just think this
21 is wrong in the way that it's crafted.

22 And the example is not bad, but, you know,
23 the circumstantial evidence is that -- is the evidence
24 that people are walking into the building with wet
25 umbrellas, and from that you can draw the reasonable

1 inference that it's raining outside, but to say that
2 "Indirect evidence means that based on the evidence you
3 can conclude the fact is true" is not good enough to suit
4 me.

5 HONORABLE TRACY CHRISTOPHER: I don't
6 understand why you think that's wrong.

7 PROFESSOR DORSANEO: Well, I'm drawing a
8 distinction between the circumstances from which
9 inferences are drawn and the inferences themselves.

10 CHAIRMAN BABCOCK: Carlos.

11 MR. LOPEZ: I'm going to do something
12 revolutionary here. I think jurors understand this until
13 we confuse them with it.

14 PROFESSOR DORSANEO: That's probably right.

15 MR. LOPEZ: I don't know why. I always
16 wondered why we even went there in the first place.
17 They're allowed to conclude that it's raining outside
18 because people are walking in with wet umbrellas. We have
19 to tell them that? They know that. That's the typical
20 commonsense thing that jurors get perfectly until we
21 confuse them by calling it circumstantial evidence and
22 making a point to tell them that it's just as good as
23 direct evidence, when in reality it's better, because a
24 footprint in the sand is better evidence that somebody was
25 walking there than some lying witness tells you somebody

1 was walking there. So, I mean, why is this in there? Why
2 can't we just -- I mean, let's just take it out. Jurors
3 get it.

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Well, I
6 thought I was going to agree with you, Carlos, but I was
7 going to say the revolutionary thing that I actually think
8 this is one of the more understandable paragraphs in all
9 the instructions we give jurors. I think people know what
10 circumstantial evidence is, and when you redefine it as
11 indirect and then use the word "circumstances" in the
12 redefinition you sort of concede that people understand
13 circumstances can establish evidence, so I like the
14 paragraph as it is. I don't know that it's wrong
15 redefined, but "indirect" implies to the jurors maybe one
16 of those legal things that they don't really know about,
17 whereas people are familiar with circumstantial and if for
18 no other reason because they probably see it every night
19 on television.

20 CHAIRMAN BABCOCK: Professors Albright and
21 Hoffman, are you teaching circumstantial evidence the same
22 way that Professor Dorsaneo is or the same way these rules
23 are?

24 PROFESSOR ALBRIGHT: Well, I don't teach
25 evidence.

1 PROFESSOR HOFFMAN: Right.

2 CHAIRMAN BABCOCK: But would you if --

3 PROFESSOR ALBRIGHT: When I talk about no
4 evidence and some evidence I'll talk about circumstantial
5 evidence, and I tend to use this kind of example just to
6 reacquaint them with their evidence class or tell them
7 they need to take it.

8 CHAIRMAN BABCOCK: What about you,
9 Professor, MMC.

10 PROFESSOR HOFFMAN: I've got none of that.

11 CHAIRMAN BABCOCK: Okay. Steve.

12 MR. SUSMAN: I think most jurors know what
13 circumstantial evidence is, but I do not think they
14 understand that it is as good as direct evidence, and I
15 think that's the message that has to be conveyed in an
16 instruction. The way this instruction is worded it sounds
17 like it's worse than direct evidence, because indirect by
18 any stretch of the imagination doesn't sound to me as good
19 as direct. So I would prefer -- I mean, I liked it the
20 way it was, I mean, and there is always an argument
21 about -- I mean, I always argue in a case, have to remind
22 jurors, and I like to have an instruction on which to
23 remind them, that circumstantial evidence is as good as
24 direct evidence, and I think that's the message that we
25 should give them, not the suggestion as contained here

1 that it's, you know, some inferior type of evidence.

2 HONORABLE STEPHEN YELENOSKY: I agree.

3 CHAIRMAN BABCOCK: Professor Dorsaneo.

4 PROFESSOR DORSANEO: Well, you know, I agree
5 with Steve that indirect is a -- looks like a pejorative.
6 It looks like it's saying that it's not of the same
7 caliber, and I think that the jury's most important
8 function is to draw inferences from the circumstantial
9 evidence because virtually all of the questions we ask
10 them require that to be done. We use mixed questions,
11 broad form questions, so I kind of like the way it has
12 been done in the ones that I've seen rather than this more
13 modern way. Maybe that's just because I'm getting old or
14 more old and like to see things the way that I've seen
15 them over time, but I don't -- I don't agree with Carlos
16 necessarily that these instructions screw them up,
17 although maybe they could in some circumstances, but I'd
18 like to go with what we have. I mean, getting too trendy
19 could cause you to kind of lose the meaning of what you've
20 been doing that was not in any need of changing.

21 CHAIRMAN BABCOCK: Judge Peeples and then
22 Justice Bland.

23 HONORABLE DAVID PEEPLES: The existing
24 definition, I think the word "established" is in that
25 three times, and I think that comes very close to being a

1 comment on the weight of the evidence. A fact isn't
2 established until the jury finds it and merely the fact
3 that someone testifies to it doesn't prove it or establish
4 it. All kinds of junk comes in that's not accepted by
5 juries, and so I just think that's a problem with the way
6 it is now. Not to say the way it was rewritten ought to
7 be adopted, but the existing language I think is very
8 problematic.

9 HONORABLE STEPHEN YELENOSKY: You could say
10 "evidence of a fact may be direct or circumstantial."

11 CHAIRMAN BABCOCK: Justice Bland and then
12 Sarah.

13 HONORABLE JANE BLAND: "Circumstantial" is
14 not a vocabulary word that most persons are familiar with.
15 Maybe "circumstance," but I would even go so far as to say
16 that most Americans are not familiar with "circumstance."
17 I do not think there is a common understanding of what
18 circumstantial means. I also think that whether you want
19 to call it direct and indirect, you know, I like that, but
20 you know, I think that the evidence, circumstantial
21 evidence can be as good as, it can be better, or it can be
22 worse than direct evidence. It's just like all other
23 kinds of evidence. It, you know, depends on what the
24 evidence is whether it's better or worse or as good as, so
25 we shouldn't try to say, you know, that it's anything in

1 terms of quality with respect to direct evidence.

2 CHAIRMAN BABCOCK: Sarah.

3 HONORABLE SARAH DUNCAN: First to address
4 what Judge Peeples said, I think that "is" as used in the
5 second and third sentence follows "a fact may be
6 established by direct evidence," and I think the "is" is
7 just trying to give a definition of what direct and
8 circumstantial are.

9 I don't know what shows the jurors are
10 watching. A lot of the shows I watch treat circumstantial
11 evidence as insufficient for an indictment or a
12 conviction, and I know that it took the Court of Criminal
13 Appeals of Texas many years before it would recognize that
14 direct and substantial evidence were equal for purposes of
15 reviewing. I would suggest that we -- I think the old
16 definition is fine, and I think most people understand it.
17 For those that don't, I would suggest moving the example
18 to follow the current version of the definition and then
19 add at the end, "A fact may be proved by direct evidence
20 or by circumstantial evidence or by both."

21 CHAIRMAN BABCOCK: Buddy and then Skip.

22 MR. LOW: Circumstantial evidence will have
23 to come from some witness, and as Steve said, the jury is
24 instructed there to judge the credibility of the witness
25 and the weight to be given their testimony. So that

1 should be the only instruction on whether you give more
2 weight or this is entitled to that, and that's in the
3 charge presently.

4 CHAIRMAN BABCOCK: Skip and then Carlos.

5 MR. WATSON: I've always wondered when I got
6 to this part why we felt it necessary to describe it as
7 direct evidence or circumstantial evidence. I've always
8 wondered why the instruction didn't say that a fact can be
9 proven by documents, testimony about what was heard or
10 what was seen, or by facts from which you can infer what
11 happened, and I just never understood the point of
12 categorizing different types of evidence rather than just
13 simply saying, "This is competent proof that you can make
14 your decision on."

15 CHAIRMAN BABCOCK: Carlos.

16 MR. LOPEZ: I hear -- I'm gathering from the
17 comments that part of why the philosophical need for this
18 comes from a reaction to TV shows or Perry Mason or
19 whatever it is that somehow the jurors come in with an
20 idea, A, of what circumstantial evidence is. I challenge
21 anybody to actually prove that, and, B, that it's somehow
22 inferior to, quote, direct evidence.

23 So I kind of stand by my earlier comments,
24 and then I'll just say that, but if we're going to give an
25 instruction I agree with the comment that was made. The

1 sentence that says, "This could prove by indirect evidence
2 that it was raining outside," I think I would suggest that
3 at a minimum we're going to have to put something in there
4 that says, "This could, if believed, prove by indirect
5 evidence that it was raining outside." In other words, it
6 has to match. I mean, the comment we made about direct
7 evidence was that if the person said it, that proves it,
8 but if the person or -- or saw it, but if the person says
9 circumstantially, I mean, it's got to be "if believed."

10 I mean, I think that last sentence is a
11 little bit misleading in that it gives it probative value
12 regardless of its credence, and I think that's -- if we're
13 going to use it I think that's just a technical thing we
14 have to fix, but I still think we create a problem and
15 then solve it where there's not a problem.

16 CHAIRMAN BABCOCK: Who had their hand up
17 next? Was it Gene? Gene.

18 MR. STORIE: I think with Steve, there is a
19 problem sometimes with people crediting direct evidence
20 more, and I would recommend that we say something like "a
21 fact may be proved equally by direct evidence or indirect
22 evidence," or "circumstantial," if you prefer that.

23 CHAIRMAN BABCOCK: And, Judge Patterson, did
24 you have your --

25 HONORABLE JAN PATTERSON: Well, I wouldn't

1 be opposed to that, but I think the current rule more or
2 less says that, and that's what I like about -- I think
3 the current rule does accomplish the simplicity and
4 equates the two. I think the harder word is "infer" as
5 opposed to "circumstantial evidence," but when you fit
6 them together I think even the people who watch *My Name Is*
7 *Earl* get that, so --

8 CHAIRMAN BABCOCK: Now, wait a second.

9 HONORABLE JAN PATTERSON: I'm a fan, I'm a
10 fan.

11 CHAIRMAN BABCOCK: Bill.

12 PROFESSOR DORSANEO: Maybe we don't want to
13 say -- and whether we do keep the current version or some
14 modification of it or go to this new one, maybe we don't
15 want to say that what we're talking about is a fact. You
16 know, because we use broader questions than just what
17 happened questions. You know, I divide questions into
18 basically two kinds, the mixed broader question and the
19 kind of what happened question, and the what happened
20 questions look like they're about -- they're strictly
21 about facts, although it may not be a specific fact. It
22 may be a broader thing, whether something was defective,
23 okay, it might say that's a fact and it's more complicated
24 than whether it was bent, but these mixed questions, I
25 don't -- although we call them fact questions because

1 they're for the jury, I don't know if it's helpful to
2 refer to them as facts.

3 I mean, the jury is going to be answering
4 questions, and they're going to determine, you know, maybe
5 matters or -- and maybe I'm just, you know, thinking about
6 this, overcomplicating it, but I have the distinct
7 impression that lawyers are confused by some of these
8 basic things because they're not thinking about it enough.

9 CHAIRMAN BABCOCK: Judge Yelenosky and then
10 Tom.

11 HONORABLE STEPHEN YELENOSKY: Well, I mean,
12 if we want to get rid of fact but we still want to make
13 the distinction, can't we just say, "Evidence may be
14 direct or circumstantial or both. Direct evidence is
15 documentary evidence or the testimony of witnesses who saw
16 the act done or heard the words spoken. Circumstantial
17 evidence" -- or something that leaves out the word "fact"
18 as well. I don't know that we need to use "fact."

19 CHAIRMAN BABCOCK: Tom Riney.

20 MR. RINEY: I agree with Skip and Carlos. I
21 think we're running the risk of overcomplicating
22 something. It seems to me the proposed instruction is
23 attempting to tell jurors how they should decide things
24 and what they should consider, and we're telling them to
25 do it the way in which people normally weigh facts and

1 make decisions. In absence of an alternative explanation
2 most people are going to assume that everybody comes in
3 with wet umbrellas that it's raining outside, but having
4 said that, I really don't like that example. I don't
5 think we ought to try to use examples because there could
6 be some alternative explanations, and lawsuits oftentimes
7 are not based on what's usual. It's because the hoof
8 beats are caused by the zebras and not horses, so I think
9 any time we start using examples we're going to just
10 overcomplicate matters.

11 CHAIRMAN BABCOCK: I agree. Sarah.

12 HONORABLE SARAH DUNCAN: And I don't have a
13 strong feeling about the example one way or another. If
14 there is a jury question, there is a disputed fact or
15 there shouldn't be a jury question. Can we agree on that?

16 PROFESSOR DORSANEO: Uh-huh.

17 HONORABLE SARAH DUNCAN: So there is a
18 disputed fact, and the jury is going to have to decide it.
19 That's the only time this comes into play, so I don't know
20 how we can use a word other than "fact" because that's
21 what this is going to be used for.

22 PROFESSOR DORSANEO: Well, yeah, but if
23 we're going to ask the jury whether the defendant was
24 negligent --

25 HONORABLE SARAH DUNCAN: Right.

1 PROFESSOR DORSANEO: -- then ask them
2 negligence. I mean, that's --

3 HONORABLE SARAH DUNCAN: A mixed question of
4 law and fact, but to decide that question they have to
5 decide the subsidiary facts.

6 MR. LOW: Right.

7 HONORABLE SARAH DUNCAN: And that's what
8 they are, are facts. They're not something -- some other
9 creature.

10 PROFESSOR DORSANEO: They're more than
11 facts. They're the application of law. They do more.
12 They decide the fact and then they decide whether there
13 was negligence.

14 HONORABLE SARAH DUNCAN: That's right. But
15 to decide whether there was negligence, they have to
16 decide the disputed facts. That's all this instruction
17 does.

18 PROFESSOR DORSANEO: But they're not there
19 yet. Once they decide the fact of whether somebody failed
20 to apply the brakes then they have to go to the next
21 level.

22 HONORABLE SARAH DUNCAN: But we're not
23 talking about the next level in this instruction. That's
24 another instruction.

25 PROFESSOR DORSANEO: Yes, we are, when we're

1 talking about circumstantial. There's another instruction
2 about circumstantial evidence drawing the inference of
3 negligence? I don't know that there's an additional one.

4 HONORABLE SARAH DUNCAN: But there's --
5 you're not drawing an inference of negligence. You're
6 drawing an inference of whether they ran the red light.

7 PROFESSOR DORSANEO: And then the inference
8 of negligence. Negligence is the question.

9 HONORABLE SARAH DUNCAN: That's only because
10 we have mixed questions, but negligence --

11 PROFESSOR DORSANEO: Everybody has mixed
12 questions.

13 HONORABLE SARAH DUNCAN: -- is a legal
14 question.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Well, the
17 paragraph one or two above that says, "You are to decide
18 the questions by a preponderance of the evidence." I
19 don't think that paragraph uses the word "fact." It just
20 says you're to decide by a preponderance of the evidence,
21 you answer the questions "yes" or "no," and it's talking
22 about those ultimate questions which are sometimes mixed
23 questions of fact and law, negligence or whatever. So I'm
24 still unclear, even given your debate and without deciding
25 which of you is right or wrong, why do we have to use the

1 word "fact" here?

2 CHAIRMAN BABCOCK: Sarah.

3 HONORABLE SARAH DUNCAN: Because that's what
4 we're talking about, is how to determine whether a fact
5 exists. And I don't -- I don't care. I just don't want
6 to -- I don't care whether we call it a fact or a pong,
7 but let's not kid ourselves about what the jury is doing.
8 They're finding facts. They're applying law that the
9 judge gives them to those facts to make determinations
10 that are both part law and part facts. What we're talking
11 about here is how do people go about deciding whether a
12 fact exists, and they decide based on two types of things
13 they see and hear, and those two types of things are
14 direct and circumstantial, and Bill and I can debate all
15 day long, and I don't know that it makes any difference
16 which one of us is right.

17 PROFESSOR DORSANEO: They're just two ways
18 of looking at the same thing, so --

19 HONORABLE SARAH DUNCAN: Yeah, I don't --
20 has this -- well, it doesn't --

21 PROFESSOR DORSANEO: I think we're victims
22 of our own propaganda when we say, you know, that these
23 are what the jury does, is to find facts. I mean, they do
24 something more than that. Facts in the sense that you use
25 the term.

1 HONORABLE SARAH DUNCAN: They do a whole lot
2 more than that.

3 PROFESSOR DORSANEO: Huh?

4 HONORABLE SARAH DUNCAN: They do a whole lot
5 more than that.

6 PROFESSOR DORSANEO: So why don't we give
7 them an instruction that will help them do what they're
8 doing?

9 HONORABLE SARAH DUNCAN: Well, that truly
10 would be revolutionary, and I would agree with that, but
11 that's not what's being proposed.

12 CHAIRMAN BABCOCK: Judge Patterson and then
13 Buddy.

14 HONORABLE SARAH DUNCAN: This is
15 incremental.

16 HONORABLE JAN PATTERSON: Well, there is
17 very often an overlap between the two, but I would venture
18 to say that it's a useful exercise to instruct the jury
19 that their province is the facts and the court's is of the
20 law and that I would certainly hate to blur that anymore
21 than it has been.

22 CHAIRMAN BABCOCK: Buddy and then Sarah and
23 then Judge Christopher.

24 MR. LOW: The first instruction under 226 is
25 a case tried versus so-and-so, "This is a civil action to

1 be tried before a jury. Your duty as a juror will to be
2 decide the disputed facts," there's the duty of the judge,
3 and then you ask, as Steve says, to define mixed question
4 of fact and law by a preponderance of the evidence, but
5 we've always instructed them it's their duty to be the
6 finders of the facts.

7 Now, that -- it might be a fact that it's
8 raining. That might not be an ultimate issue. It might
9 be whether he was negligent in driving and you should slow
10 down because it's raining, but it is a fact whether it was
11 raining or not, so I don't know how we get away from
12 facts.

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH DUNCAN: What I think we
15 really need is an instruction on equal inference rule. I
16 see that more as a problem than this. To tell a jury that
17 they can infer a fact is great, but if you don't tell them
18 that another fact, if another fact is equally inferable
19 from the evidence you've got then you can't infer either
20 one, now that's something that's probably beyond the can
21 of most jurors.

22 PROFESSOR DORSANEO: We could have a real
23 argument about that. Because that's just wrong what you
24 said.

25 CHAIRMAN BABCOCK: Judge Christopher.

1 HONORABLE SARAH DUNCAN: It's simplistic.

2 PROFESSOR DORSANEO: It should be wrong.

3 HONORABLE SARAH DUNCAN: It's simplistic.

4 CHAIRMAN BABCOCK: Judge Christopher and
5 then Judge Peeples.

6 HONORABLE TRACY CHRISTOPHER: Okay. The
7 current version of this instruction, the pattern jury
8 charge instruction, is based on case law, and I actually
9 haven't pulled those particular cases to look, but
10 generally anything that's in the pattern jury charge is
11 drawn almost word for word from a Supreme Court case if
12 there's one on the issue, so you-all might be right, and
13 I'm not following either of you truthfully.

14 HONORABLE SARAH DUNCAN: It doesn't matter.

15 HONORABLE TRACY CHRISTOPHER: But the
16 current language is in a Supreme Court case, according to
17 the comments associated with it. I suggest we just take a
18 vote on whether people want to change it or not. I don't
19 think that this committee could eliminate what's in the
20 current PJC version because it's based on case law. We
21 were trying to go something other than case law. I mean,
22 even if we took some sort of a straw vote that, you know,
23 we don't like it at all like Carlos suggested --

24 MR. LOPEZ: There's three of us.

25 HONORABLE TRACY CHRISTOPHER: -- you know,

1 that's not going to stop a lawyer from saying, "Judge, I
2 want circumstantial evidence, right here in the case,
3 please give to it me."

4 CHAIRMAN BABCOCK: Judge Peeples.

5 HONORABLE DAVID PEEPLES: Well, I was simply
6 going to say that we need to step back and remember what
7 we're doing here. I think Steve Susman kind of put his
8 finger on it. The importance of this is in some cases if
9 you rely on circumstantial evidence and you just don't
10 have direct evidence, you want something in the charge
11 that you can talk about in argument and your allies in the
12 jury room can point to the charge saying it's all right to
13 find something because -- without a direct witness on it.

14 And a great case was Lozano vs. Lozano,
15 decided by the Supreme Court with an interference with
16 child custody. They didn't have any direct testimony that
17 this family had helped the son run off with the child and
18 hide from the mother. There was all kinds of
19 circumstantial evidence from which you could infer that
20 they knowingly were in cahoots with him, and if I had been
21 the lawyer for the mother I would have begged for an
22 instruction like this so the jury wouldn't be thinking,
23 "Gosh, I suspect they're in on it with this son of theirs
24 and their brother, but, gosh, there was no direct
25 testimony, therefore, I've got to find" -- no. I mean,

1 the importance of this is, as Steve said, you've got to
2 tell the jury you can rely upon this. I don't think we
3 need -- and it might not be true that it's necessarily
4 just as good. Sometimes it is and sometimes it's not as
5 good as direct evidence, but that's the importance of it,
6 and we need to remember that.

7 CHAIRMAN BABCOCK: Okay. Let's -- as Judge
8 Christopher suggests, let's take a vote on this. How many
9 people think we should change the current version of
10 circumstantial evidence? Raise your hand.

11 MR. STORIE: Just any change at all, like
12 one word?

13 CHAIRMAN BABCOCK: Along the lines of what's
14 suggested, but change circumstantial evidence.

15 Opposed? By a vote of 24 to 4 the opponents
16 of change prevail. So change is running neck and neck
17 today with no change.

18 HONORABLE HARVEY BROWN: Chip?

19 CHAIRMAN BABCOCK: Yes, Harvey.

20 HONORABLE HARVEY BROWN: This is not part of
21 226 now, right? Even the top one is just what a lot of
22 judges currently use.

23 HONORABLE STEPHEN YELENOSKY: It's optional.

24 HONORABLE HARVEY BROWN: Is it in the rule
25 as optional?

1 HONORABLE DAVID PEEPLES: It's in the
2 pattern jury charge.

3 HONORABLE TRACY CHRISTOPHER: It is not in
4 226.

5 HONORABLE HARVEY BROWN: Right.

6 HONORABLE TRACY CHRISTOPHER: It's in every
7 single pattern jury charge saying it's optional and if you
8 do it where exactly to put it, right after preponderance
9 of the evidence and before all the questions.

10 HONORABLE HARVEY BROWN: So I was going to
11 suggest that I think it should be part of 226a.

12 MR. LOPEZ: You're killing me, Harvey.

13 CHAIRMAN BABCOCK: Okay. Judge Peeples.

14 HONORABLE DAVID PEEPLES: And I would like
15 to suggest if this is verbatim from the Supreme Court I'm
16 not in favor of tampering with it. If this is what PJC
17 has done synthesizing cases, I think there are problems
18 with the way it's worded right now.

19 HONORABLE TRACY CHRISTOPHER: Here, let me
20 pull up your book right there. We'll do this over lunch.
21 We'll get the case for you.

22 CHAIRMAN BABCOCK: Okay. Skip.

23 MR. WATSON: May I suggest to Judge
24 Christopher, ten years on the PJC taught me that it's not
25 necessarily -- what's in there is not necessarily from a

1 Supreme Court case. I'll give you one example. If you
2 look at the current civil conspiracy charge it will cite
3 Triflex Communication as the source material. If you go
4 back and read Triflex you will find that the charge that's
5 in the PJC is almost verbatim, that's correct, the charge
6 that was 9-0 overruled by the Supreme Court in Triflex
7 Communication. That vote was nine to eight. I was one of
8 the eight that lost that to change it. It just doesn't
9 necessarily reflect what the Court said, and somebody is
10 going to get busted big time by relying on that because
11 they have come out twice more and said that but have never
12 said, "Thou shalt change the PJC."

13 Another example, proximate cause is in the
14 PJC without substantial factors as being a part of it.
15 It's just but for causation. The Court has said for ten
16 years that substantial cause has got to be there.

17 MR. LOW: Right, absolutely.

18 MR. WATSON: Anybody who objects to that
19 gets busted. They just did it on December 23rd for the
20 third time in ten years, and the PJC still hasn't been
21 changed. SO I just --

22 MR. LOW: That's right.

23 HONORABLE TRACY CHRISTOPHER: That might
24 change. No, seriously, that might change as of May.

25 MR. WATSON: Well, I hope so.

1 HONORABLE TRACY CHRISTOPHER: It's hotly
2 contested in the PJC committee.

3 CHAIRMAN BABCOCK: The PJC is not infallible
4 is your point.

5 MR. WATSON: Pardon me?

6 CHAIRMAN BABCOCK: The PJC is not infallible
7 is your point.

8 MR. WATSON: Correct.

9 CHAIRMAN BABCOCK: Okay. Good. Judge
10 Christopher, let's see if we can go to the new -- the old
11 stuff that we've already --

12 HONORABLE TRACY CHRISTOPHER: Okay. All
13 right. I recognize I lost the vote on putting any sort of
14 contempt in.

15 CHAIRMAN BABCOCK: But you're still running
16 through the convention, right?

17 HONORABLE TRACY CHRISTOPHER: But I wasn't
18 here, so I brought it back up again. It was a close vote,
19 if I remember.

20 MR. MEADOWS: It's a time honored thing.

21 HONORABLE TRACY CHRISTOPHER: And all I have
22 done is brought to you a Florida instruction that I think
23 is kind of elegant, and the only thing that I worry about
24 is when you watch the voir dire, you know, I really do
25 feel that people don't take it that seriously that are

1 sitting there, even though they're supposed to, and I
2 really like this description that they have.

3 It's page seven in my memo. "You have sworn
4 to answer all questions truthfully." That's the oath we
5 just gave. "If you don't understand a question, raise
6 your hand. Remaining silent when you have information to
7 disclose is as much a violation of your oath as making a
8 false statement. Violation of your oath to tell the whole
9 truth would be very serious and could result in civil and
10 criminal penalties against you." I thought it was
11 eloquently written. I've just brought it forward in case
12 it changed anybody's mind. I don't need another vote.

13 CHAIRMAN BABCOCK: Okay. Anybody's mind
14 changed by this, this Floridian thing? She wants a
15 recount.

16 HONORABLE TRACY CHRISTOPHER: Just
17 suggesting it. I liked the way it was written. Okay.
18 That's good enough.

19 CHAIRMAN BABCOCK: All right. Moving right
20 along.

21 HONORABLE TRACY CHRISTOPHER: Moving on.
22 Pages eight, nine, ten, eleven, and twelve are where we
23 have gone back and beefed up the cell phone and internet
24 discussion that we had before. The vote was to make sure
25 that phones and electronic devices were turned off during

1 court proceedings and jury deliberations. I know that the
2 jury deliberations part was hotly debated, but the vote
3 was in favor of that.

4 We also beefed up don't use the internet to
5 learn anything about the case because we had discussed
6 that. That's on page nine. I don't think any of this is
7 controversial. On page eleven, again, this is remember to
8 turn off your phones during deliberations. You can use
9 them during breaks, but don't use them to look up facts,
10 and that was what had previously been voted on, so I'm
11 just showing the language that we came up with.

12 Also, because it is getting more and more
13 prevalent, people looking up stuff on the internet, we've
14 also added that at the end of the instruction that the
15 juror -- that the judges tell them at the end of the day,
16 "Remember, don't go look up stuff." So I don't think
17 anything in there is controversial, just showing you how
18 our draft is progressing.

19 CHAIRMAN BABCOCK: Okay. Any comments on
20 any of that? Okay.

21 HONORABLE TRACY CHRISTOPHER: The last one
22 probably maybe we want to wait until after lunch in case
23 some of us are getting hungry.

24 CHAIRMAN BABCOCK: That's the Chair's
25 strategy.

1 HONORABLE TRACY CHRISTOPHER: Is the term
2 "preponderance of the evidence." Okay. Our subcommittee
3 has come back with what is on page 13. The first two
4 sentence, three sentences are what's in the current rule.
5 The bracketed sentence is considered maybe a little
6 controversial, and then the sentence that starts "For a
7 fact to be proved by a preponderance of the evidence you
8 must find that the fact is more likely true than not true"
9 is -- follows the more likely than not vote that we took
10 the last time. So we have the bracketed change that
11 hadn't been discussed before and the more likely than not
12 change in that one sentence.

13 CHAIRMAN BABCOCK: Okay. Yeah, talk about
14 bracketed first?

15 HONORABLE TRACY CHRISTOPHER: Tom.

16 MR. RINEY: I missed both the October
17 meeting of this committee and the PJC committee, so they
18 assigned me to write this, and this has been through a
19 three-person subcommittee, but it's not even been to the
20 full PJC Oversight Committee. Somebody, I don't know who,
21 did a bunch of research and had the definition from a
22 number of different states, so what I did was kind of put
23 together what I like just based on the different states
24 and then we worked on it in the subcommittee, and the
25 subcommittee's comment was "The part that's in brackets is

1 going to be controversial, so let's put it in brackets
2 just to point out that not everybody might like that."

3 That's the story about how the language got
4 put in there. And we did drop the word "degree." I mean,
5 "what the greater weight and degree of the credible
6 evidence" because no one so far that I have talked to can
7 explain what that means.

8 HONORABLE TRACY CHRISTOPHER: Including
9 evidence professors that I e-mailed and said, "What is the
10 degree of evidence?"

11 CHAIRMAN BABCOCK: Richard Munzinger.

12 MR. MUNZINGER: There is no reference to
13 "credible" or any other standard that the jury has
14 accepted the evidence as credible in this definition.

15 HONORABLE JANE BLAND: Yes.

16 HONORABLE TRACY CHRISTOPHER: It's right
17 above it. "Greater weight of the credible evidence," and
18 we didn't change that.

19 MR. MUNZINGER: I apologize. I apologize.
20 Thank you.

21 CHAIRMAN BABCOCK: What else about the
22 brackets? Never before in the history of the tournament
23 have all four number one seeds made it through the
24 brackets. Judge Peeples.

25 HONORABLE DAVID PEEPLES: Well, I missed a

1 couple of meetings, but I'm curious what's the argument
2 against the bracketed language? Does anybody say that's
3 not a correct statement of the law?

4 HONORABLE STEPHEN YELENOSKY: Well, it is,
5 but it could be -- depending on how the cases are, it
6 could look like you're siding with one side or another
7 because one side might be saying, "Look at all these
8 people, all these people. On the other side there's only
9 one person," and it might -- it says it's not necessarily
10 true, which is correct, but for the judge to say that in a
11 case where one side is saying "Everybody but one on the
12 other side is saying X" sounds to me like you're saying,
13 "Well, don't be swayed by that."

14 HONORABLE TRACY CHRISTOPHER: A lot of
15 states have language that's similar to this. You know,
16 the idea that, you know, you just don't count up the
17 witnesses sort of thing, and a lot of -- this language,
18 for example, is in the Indiana one almost verbatim from
19 it. So a lot of states when they're trying to explain
20 preponderance of the evidence add more information to it.
21 The 51 percent or, you know, the feather, the grain of
22 sand, and things like that is considered very
23 controversial in most states that have discussed it,
24 although a few states actually do have that language in
25 their preponderance of the evidence charge, but I think

1 that the bracketed information is in a lot of states, and
2 as best I've seen through the research is not
3 controversial. It's just a question of whether we want to
4 put it in or not and whether it's useful.

5 CHAIRMAN BABCOCK: Bill.

6 PROFESSOR DORSANEO: I like the bracketed
7 sentence because it helps with the other language that
8 precedes it. It helps defuse this idea that we're talking
9 about, you know, greater weight, which does suggest that
10 if you had -- does clearly suggest if you had a larger
11 quantity of evidence that it would weigh more, so I think
12 the bracketed sentence -- the bracketed sentence adds
13 something of value.

14 HONORABLE STEPHEN YELENOSKY: Maybe the
15 "greater weight" language is the problem.

16 CHAIRMAN BABCOCK: Pete Schenkkan.

17 MR. SCHENKKAN: Yeah, that was going to be
18 my suggestion. I wasn't here for the earlier discussion,
19 and I, you know, defer if this has already been talked
20 about, but it seems to me this would be a lot clearer to a
21 person with a seventh or eighth grade education if you
22 deleted both the sentence in the bracket and the sentence
23 ahead of it and went straight from "If you do not find a
24 preponderance of evidence supports a 'yes' then answer
25 'no.' For a fact to be proved by a preponderance that

1 means you must find the fact is more likely true than not
2 true," because that's the operative meaning and everything
3 after the meaningless words, "to an ordinary person proved
4 by a preponderance of the evidence" -- you know,
5 substitute "gibberish" -- "for a fact to be proved by a
6 gibberish test, you must find that a fact is more likely
7 true than not." All of those words are words of at most
8 two syllables and ordinary meanings.

9 The stuff that's ahead of it, is there
10 literature on this? I would bet that the word "credible,"
11 that if you, you know, asked people with eighth grade or
12 less educations what the word "credible" means or tested
13 their comprehension of it, it would fail the comprehension
14 tests.

15 CHAIRMAN BABCOCK: Bobby, then Steve.

16 MR. MEADOWS: Well, the exact language in
17 the bracket is not as important to me as the idea that we
18 communicate that this is a qualitative analysis or
19 qualitative issue as opposed to quantitative issue. So, I
20 mean, somehow I lean toward favoring the point because I
21 want to make the larger point that it's qualitative, so
22 that's where I come down on that.

23 The only other thing I have about this
24 proposed language is it does -- does the last sentence do
25 anything with what's said in the first two or three

1 sentences? It seems to me it's just restating what's said
2 in the beginning of the instruction.

3 HONORABLE TRACY CHRISTOPHER: You mean
4 "Whenever a question requires other than a 'yes' or 'no'?"
5 Are you talking about that sentence?

6 MR. MEADOWS: What the last sentence says is
7 "Whenever a question requires" -- yeah, "other than" --
8 "an answer other than 'yes' or 'no' your answer must be
9 based on preponderance." Isn't that what you're saying on
10 the first part of the instruction?

11 HONORABLE TRACY CHRISTOPHER: No, because
12 the way we have done it, the way the pattern jury charge
13 has done it, although it's not uniform through the books,
14 the actual question no longer says "answer 'yes' or 'no.'"
15 It just says, "Was the plaintiff negligent" and a blank,
16 you know, or "Was the defendant negligent" and a blank.
17 Most of us still put in "answer 'yes' or 'no'" in front of
18 a question that requires "yes" or "no," but some of the
19 books are written where there isn't actually the
20 instruction in each question "answer 'yes' or 'no.'"
21

22 MR. MEADOWS: Okay, if we need it, I
23 don't --

24 HONORABLE TRACY CHRISTOPHER: In a way it
25 would be simpler to go back and put -- and I think the
idea here is that a "yes" answer has to be based on a

1 preponderance of the evidence, which is -- but you don't
2 have to have that same preponderance of the evidence for a
3 "no" answer.

4 MR. MEADOWS: But don't we say that? "If
5 you do not find a preponderance of the evidence supports
6 'yes' then answer 'no.'"

7 HONORABLE TRACY CHRISTOPHER: Well, I mean,
8 you could say -- well, the bottom line is designed for
9 dollar amounts.

10 MR. MEADOWS: Oh, okay.

11 HONORABLE TRACY CHRISTOPHER: For where you
12 answer something other than a "yes" or "no" question. So,
13 I mean --

14 (Conferring with another committee member.)

15 HONORABLE TOM GRAY: Y'all know the court
16 reporter is not getting y'all's conversation.

17 HONORABLE TRACY CHRISTOPHER: It's fine.

18 HONORABLE TOM GRAY: Okay.

19 CHAIRMAN BABCOCK: Sidebar. Steve.

20 MR. MEADOWS: High level sidebar.

21 MR. SUSMAN: I mean, I tend to agree with
22 Pete, but I think you could say "the term 'preponderance
23 of the evidence' means something is more likely true than
24 not true," period. It's not just a fact. It's something,
25 because some of the answers are more than just -- I mean,

1 some of the times they are asked more than just facts,
2 right? Are you negligent? So, I mean, doesn't that solve
3 the problem and eliminate this greater -- the reason
4 you've got to put in the bracket is you put in this thing
5 about the greater weight of the credible evidence. If we
6 just said "'preponderance of the evidence' means something
7 is more likely true than not true," you solve it.

8 CHAIRMAN BABCOCK: Steve, Judge Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: Yeah, I think
10 we talked about this maybe a little last time. We're sort
11 of stuck with preponderance of the evidence, and some
12 people I think argued we're stuck with the "greater
13 weight" part as well, and I think as long as we feel stuck
14 with that we've got a problem, because every other proof
15 standard doesn't make really a reference to evidence.

16 If you think about "clear and convincing"
17 and "beyond a reasonable doubt," the reference is to the
18 degree of certainty that the fact finder has, not to the
19 amount of evidence or the weight of evidence, and they
20 should be all talking about the same thing, and so we
21 don't like preponderance, which also sounds like a
22 quantity, and so we're trying to make it what it really
23 should be, which is the degree of certainty is more likely
24 than not, yet we want to hang onto the old language that's
25 problematic, and I wish we could just get rid of the old

1 language.

2 CHAIRMAN BABCOCK: Judge Peeples.

3 HONORABLE DAVID PEEPLES: This business
4 about weight and credible, the critics of that may be
5 right, but it's important, and I want to read you a
6 sentence from 226a that I just think is extremely
7 important. This is instructions to the jury in the
8 charge: "You are the sole judges of the credibility of
9 the witnesses and the weight to be given their testimony."
10 And I -- when I do a voir dire in any kind of case, I flat
11 out freelance on this and let them know that nobody can
12 make them believe something they don't find believable and
13 nobody can tell them to give a lot of weight or a little
14 weight or no weight to something if they see it otherwise.
15 Weight and credibility are decisions for them, and nobody
16 can make them decide it one way.

17 Now, they're told that in the boilerplate
18 charge, and I think it's good that we refer to that again
19 here when we talk about preponderance of the evidence.
20 This may not be worded the best way, but I think I would
21 oppose any efforts to take that out because it is so
22 important, and I'll say this, too, so many people when
23 they show up for jury service don't understand this, but
24 when I explain it to them there's just almost an audible
25 sigh of relief. That's overstating a little bit, but it

1 just has to be communicated to them, and I think it might
2 detract from that if we take this sentence out, the
3 concepts out.

4 MR. MEADOWS: Well, doesn't it tie
5 importantly to the instruction that they give that we all
6 rely on when we try a case that they're the sole judges of
7 the credible evidence?

8 HONORABLE DAVID PEEPLES: That's just what I
9 read, yeah. "The credibility of the witnesses and the
10 weight to be given their testimony."

11 MR. MEADOWS: It's an essential part of it.

12 HONORABLE DAVID PEEPLES: It is. Very.

13 CHAIRMAN BABCOCK: Buddy.

14 MR. LOW: You're not going to change the
15 practice. I mean, this has been way back there. The
16 lawyers are going to argue the scales, they're going to
17 tilt this way, and you need to tell them, you know, that
18 just because you have more witnesses -- and no matter how
19 you define it they're going to argue it that way. Are you
20 going to prevent them from arguing it that way? This is
21 what they really mean, more true than not and we have --
22 so why not just face it and call it weight and give them
23 proper instructions like we do?

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE JANE BLAND: Well, I like the

1 committee's proposal, including the brackets, because I
2 think it says the same thing a couple of different ways;
3 and since the burden of proof is a really important
4 concept in the case and it's something that they're going
5 to hear maybe some confusing information about from, you
6 know, various descriptions of it by the attorneys, it
7 doesn't hurt for the court to say it both ways and let the
8 lawyers argue it. You know, if they want to focus on more
9 likely true than not true, great; if they want to talk
10 about credibility and what that means, great. It gives
11 everybody a little bit of room to work with on this
12 concept that's probably something new to jurors.

13 CHAIRMAN BABCOCK: Yeah, Jim.

14 MR. PERDUE: Not to delay lunch, but I
15 was -- it seems to me a couple of observations were made,
16 and I just wanted to second them. If you keep the
17 sentence in "The term 'preponderance of the evidence'
18 means the greater weight" then the bracketed sentence is a
19 very helpful addition it seems, but I would second what
20 Judge Yelenosky and Steve Susman said, to get to the
21 essence of the concept, which is just defining it as a
22 degree of belief as opposed to in terms of the evidence,
23 you would go to the term "preponderance of the evidence
24 means that a fact is more likely true than not true."

25 So you could -- you could get rid of them,

1 and I see -- I know Judge Peeples just talked about it,
2 but the second sentence of the charge is "You are the sole
3 judges of the credibility of the witnesses and the weight
4 to be given their testimony." I don't know of anything
5 that is more emphasized through a trial and through the
6 charge than that initial instruction, and I don't know
7 that that concept needs to be reincorporated into the
8 burden of proof when it is primary repeatedly throughout
9 the trial, and this is something that's shown itself in
10 studies to be so difficult. So I'm good with the proposal
11 of the committee with the brackets, but also it seems to
12 me that I think Judge Yelenosky and Mr. Susman touched on
13 a way to do it cleaner.

14 CHAIRMAN BABCOCK: Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Well, and in
16 my brief experience as a judge, so I would like to know
17 what the other judges' experience is, one side or the
18 other says to the jury "more likely than not." I've never
19 had the other side object to that and ask me to instruct
20 them that's not the law, so even though it's not in the
21 charge at least I've allowed them to say that.

22 Have you ever had anybody object and say the
23 preponderance can't -- does not mean more likely than not?
24 I mean, we allow them to do that presumably because we
25 think that's correct.

1 HONORABLE TRACY CHRISTOPHER: I have had
2 people object to the use of the balancing and the scales
3 and the 51 percent, and I don't actually sustain it. I
4 just say, "You will be told that the preponderance of the
5 evidence means the greater weight and degree of the
6 credible testimony of the evidence in the case."

7 HONORABLE STEPHEN YELENOSKY: And they go
8 "gibberish."

9 HONORABLE TRACY CHRISTOPHER: Right. So, I
10 mean, some judges will shut people down on the 51 percent
11 or the feather or the grain of sand, and sometimes they
12 don't shut them down and then in the closing arguments
13 defense lawyer will say, "Look at this charge, there's
14 nothing in here about a feather, there's nothing in here
15 about a grain of sand. It's the greater weight and degree
16 of the credible evidence," so --

17 HONORABLE STEPHEN YELENOSKY: Well, but --
18 but have you ever sustained an objection to more likely
19 than not? I've never heard one, so I can't say I've ever
20 ruled on one, but I would not sustain that objection based
21 on my understanding of the law, so again, I guess I would
22 just repeat what I said.

23 CHAIRMAN BABCOCK: Okay. Yeah, Justice
24 Gray.

25 HONORABLE TOM GRAY: This is really more of

1 an observation than a comment on what's correct or not,
2 but it's interesting that we use "answer" all the way
3 through other than in the next to last sentence, and we
4 say "for a fact to be proved," and "you must find that the
5 fact is more likely than" -- "true than not true," and
6 that seems to be disjointed from the rest of the
7 instruction where throughout it we are talking about our
8 answer.

9 HONORABLE TRACY CHRISTOPHER: Yeah, we could
10 change it to "answer."

11 CHAIRMAN BABCOCK: Harvey and then Judge
12 Patterson.

13 HONORABLE HARVEY BROWN: I used to tell the
14 jury "credible" meant believable. In fact, one of the
15 comments over here that some jurors don't know what
16 credible means, I don't know if "believable" is missing
17 anything that's in the word "credible," but I think it's a
18 word that's more common for a lot of people.

19 CHAIRMAN BABCOCK: Justice Patterson.

20 HONORABLE JAN PATTERSON: My concern about
21 the bracketed sentence is that while the rest of the
22 paragraph is fairly neutral it would seem to me that in
23 almost any case that sentence would be describing one side
24 or the other --

25 HONORABLE STEPHEN YELENOSKY: Right. It's a

1 comment.

2 HONORABLE JAN PATTERSON: -- and would be a
3 comment on the evidence, so it just strikes me that it's
4 not a neutral sentence.

5 CHAIRMAN BABCOCK: Justice Bland.

6 HONORABLE JANE BLAND: Well, I think we
7 sometimes do put a comment like that in, if there's the
8 potential for confusion. Like, for example, with
9 percentage of responsibility, we always say, you know,
10 "determining a percentage of responsibility is not
11 necessarily based on the number of acts proved" or
12 something like that, and any time when we're trying to
13 emphasize this idea of quality over quantity we kind of
14 put something in so that people understand that. So even
15 if it does slightly say we're not here focusing on number
16 of witnesses, we're just focusing on quality, that that
17 may not be a bad concept to introduce.

18 CHAIRMAN BABCOCK: Judge Christopher. I'm
19 sorry. Judge Christopher, what -- should we vote on the
20 brackets?

21 HONORABLE TRACY CHRISTOPHER: Yes, because I
22 mean, to make a change like this, you know, we want it put
23 into 226a, so that it, you know, has the imprimatur of the
24 Supreme Court.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE TRACY CHRISTOPHER: So that
2 there's not a question that it's a comment on the weight
3 in some manner.

4 CHAIRMAN BABCOCK: Okay. So everybody who
5 is in favor of the language between the brackets raise
6 your hand.

7 Everybody opposed, raise your hand. The
8 vote is 19 to 6 in favor, with the Chair not voting. Is
9 there any other vote we can take on this proposed language
10 that would be helpful?

11 HONORABLE TRACY CHRISTOPHER: Well, I think
12 we already voted in favor of adding the more likely true
13 than not true standard, so other than changing "fact" to
14 "answer."

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE TRACY CHRISTOPHER: Which I would
17 be okay with.

18 CHAIRMAN BABCOCK: And do you have more --
19 it looks to me like there may be some additional things --

20 HONORABLE TRACY CHRISTOPHER: No, that's
21 done. This is the end of mine.

22 CHAIRMAN BABCOCK: End of yours?

23 HONORABLE TRACY CHRISTOPHER: Yeah.

24 CHAIRMAN BABCOCK: Okay. That's a good time
25 to break for lunch unless somebody has comments. Yeah,

1 Judge.

2 HONORABLE DAVID PEEPLES: Very quickly --

3 HONORABLE STEPHEN YELENOSKY: Can we have a
4 vote just on going from "preponderance" to "more likely
5 than not"? I mean, it sounds like it's going to lose, but
6 I'd like to see.

7 CHAIRMAN BABCOCK: Say this again.

8 HONORABLE STEPHEN YELENOSKY: Just going
9 straight from "preponderance of the evidence" to "more
10 likely than not."

11 PROFESSOR HOFFMAN: Dropping "great weight"
12 and therefore also dropping "preponderance."

13 MR. PERDUE: And it would read, "The term
14 'preponderance of the evidence' means that a fact is more
15 likely true than not true."

16 MR. SCHENKKAN: Or "answer."

17 MR. PERDUE: Yeah, "answer," an answer.

18 CHAIRMAN BABCOCK: And you're --

19 HONORABLE STEPHEN YELENOSKY: I'm proposing
20 that.

21 CHAIRMAN BABCOCK: You're proposing that,
22 and you want to vote on whether we should drop --

23 HONORABLE STEPHEN YELENOSKY: Just vote up
24 or down to state it that way. I propose that we state it
25 as just read by Jim.

1 CHAIRMAN BABCOCK: Okay. So let's be clear
2 on what we're voting, though. You want to --

3 HONORABLE STEPHEN YELENOSKY: Well, I'm
4 suggesting that the sentence on the fourth line read, "The
5 term," quote, "'preponderance of the evidence,'" unquote,
6 "means" and then jump down to "more likely true than not
7 true," period. And then the last sentence.

8 CHAIRMAN BABCOCK: Okay. Tom.

9 MR. RINEY: Let me just comment on that.
10 That could then be based upon the belief that was held
11 before they came into the courtroom. You've just taken
12 all of the evidence in the trial out of consideration.

13 HONORABLE STEPHEN YELENOSKY: Well,
14 elsewhere we instruct them that they're to base their
15 decision on the evidence in the trial, they're to
16 determine the credibility on their own and the weight to
17 be given it, and as I said, the other standards that we
18 apply I don't think incorporate all the things we
19 incorporate into preponderance, but we don't seem to have
20 a problem with them. I don't think the clear and
21 convincing instruction repeats all this.

22 CHAIRMAN BABCOCK: Yeah. Pete.

23 MR. SCHENKKAN: And I would add to what
24 Judge Yelenosky just said, in the part we're not proposing
25 to delete, I join the proposal. Up above there they're

1 saying it must be based on a preponderance of the
2 evidence, "If you do not find that a preponderance of the
3 evidence," and we're now defining "a preponderance of the
4 evidence." There's plenty of references to the fact we're
5 talking about evidence.

6 HONORABLE STEPHEN YELENOSKY: So that's my
7 proposal.

8 MR. RINEY: If the jury doesn't understand
9 the word "credible" I'm not sure they're going to make
10 that leap.

11 CHAIRMAN BABCOCK: Richard Munzinger.

12 MR. MUNZINGER: Before the vote is taken I
13 would just caution everybody that all the trial judges
14 that I've ever worked in front of submit questions "Do you
15 find from a preponderance of the evidence that X," and if
16 you're going to change this rule to make the words
17 "preponderance of the evidence" equal "more likely than
18 not," I'm not sure that the grammar of that instruction of
19 the trial court would be correct. I'm not sure that you
20 haven't caused more problems than you're attempting to
21 cure, and I don't think that it is something that should
22 be done right before lunch if a majority is in favor of
23 that rule because I think you're going to --

24 HONORABLE STEPHEN YELENOSKY: Well, maybe it
25 should just say "the fact is more likely true than not" if

1 I left out "the fact" or "the answer." I accept that.

2 CHAIRMAN BABCOCK: So if it goes down in
3 smoke you have no objection. Professor Hoffman.

4 PROFESSOR HOFFMAN: I don't understand that
5 objection for the same reason I don't understand -- you
6 don't even need to do any cutting or pasting. You could
7 just cut and just have the sentence, I think, Judge
8 Yelenosky, to get you exactly what you want, "For a fact
9 to be proved by a," quote, "'preponderance of the
10 evidence' you must find the fact is more likely true than
11 not true." And if we voted the sentence that's in there
12 unchanged.

13 HONORABLE STEPHEN YELENOSKY: I see.

14 PROFESSOR HOFFMAN: Cut the other stuff out,
15 it accomplishes exactly what you want to accomplish, which
16 is to drop the greater weight business and, therefore,
17 drop the accompanying parenthetical. So all I'm saying
18 is, is keep in exactly what I think we just have otherwise
19 accepted, and thus I don't understand your objection, the
20 sentence that begins "for a fact to be proven" and just
21 maybe put quotes around "the evidence" since it's the
22 first time it will show up.

23 HONORABLE STEPHEN YELENOSKY: All right.

24 CHAIRMAN BABCOCK: Yeah. Richard Munzinger.

25 MR. MUNZINGER: There is a lot of cases that

1 talk about a fact must be proven by a preponderance of the
2 evidence. I don't recall reading a lot that say a fact
3 must be proven more likely than not. I don't know that
4 you are changing substantive law. I just say that while
5 all this may be wonderful, I think you better be
6 comfortable.

7 MR. LOW: The appellate review is against
8 the greater weight. I mean, man, we're looking at a long
9 history of things we're going to change now.

10 MR. MUNZINGER: I'm just very concerned that
11 you're adopting something that makes imminent common
12 sense. I agree with all the language concepts that are
13 talked about, but we don't work in a vacuum. We work with
14 centuries of history of common law and precedence, and you
15 need to be careful before you start changing definitions
16 under the cloak of the Texas Supreme Court and causing
17 problems for people. I'm not sure that we've given it
18 sufficient thought. That's my comment.

19 CHAIRMAN BABCOCK: Carlos.

20 MR. LOPEZ: Well, are we taking -- would we
21 be taking out the reference to greater weight?

22 CHAIRMAN BABCOCK: That's -- I'm not clear
23 about that yet.

24 HONORABLE STEPHEN YELENOSKY: Yes. Yes.

25 PROFESSOR DORSANEO: That's his proposal.

1 HONORABLE STEPHEN YELENOSKY: As suggested
2 by professor. We wouldn't add anything. We wouldn't cut
3 in the middle of the sentence. We would simply take out,
4 let's see, one, two, three -- we would take out the fourth
5 and fifth sentence including the -- and the fifth is the
6 bracket.

7 MR. LOPEZ: I just think it -- you know, I
8 think we risk becoming -- it just becomes circular. I
9 mean, they're trying to decide whether something is more
10 likely than not and in so doing they're supposed to decide
11 if there's a preponderance of the evidence in support of
12 it. We've taken out the reference to what either of those
13 mean and said they mean -- they mean the same thing, but
14 we've not told them what either one means --

15 CHAIRMAN BABCOCK: Judge Christopher.

16 MR. LOPEZ: -- whereas before we used to.
17 We had a definition for it.

18 HONORABLE TRACY CHRISTOPHER: I actually
19 have done research on what is a preponderance of the
20 evidence, and it -- "the greater weight of the credible
21 evidence" has been used since about 1886 or so. The
22 problem in terms of what it actually means, we don't have
23 any case law on what it actually means because courts
24 don't review the evidence on a preponderance of the
25 evidence standard.

1 HONORABLE STEPHEN YELENOSKY: Right.

2 HONORABLE TRACY CHRISTOPHER: Okay. So the
3 definition has been around since forever, but no one
4 actually discusses what that means in current case law.
5 We have started -- the Supreme Court has started to use
6 the more likely than not standard in its more recent
7 opinions, and usually in connection with certain types of
8 evidence, so for example, in Wal-Mart Stores vs. Gonzales,
9 the Supreme Court concluded that "when circumstantial
10 evidence is relied upon to prove constructive notice the
11 evidence must establish that it is more likely than not
12 that the dangerous condition existed long enough to give
13 the proprietor a reasonable opportunity to discover the
14 condition."

15 In *Merrell Dow vs. Havener*, the Court
16 analyzed the scientific evidence under a more likely than
17 not standard. Now, the lower court opinions have also
18 used the more likely than not standard when they're
19 analyzing a specific fact. So, for example, with res
20 ipsa, the Austin court of appeals has done that.
21 Causation in a medical case doesn't have to be to a
22 certainty. It's a more likely than not standard. That's
23 also in -- actually, that's also a Supreme Court case.
24 "The quantum of proof required is that it is more likely
25 than not that the ultimate harm or condition resulted from

1 such negligence," so more likely than not is definitely in
2 current case law, so I don't really think that we're
3 leaping.

4 CHAIRMAN BABCOCK: Okay. One more comment,
5 then we're going to vote. Go ahead.

6 MR. LOPEZ: Well, I don't think there is any
7 question that more likely than not is the standard or that
8 it's even the correct standard. The question is are we
9 giving them a definition for it. More likely than not is
10 a conclusion that gets drawn from the evidence.

11 MR. MEADOWS: And what kind of evidence?
12 Because that's my problem, is more likely than not based
13 upon what?

14 MR. LOPEZ: The greater weight and degree of
15 the credible evidence. We've taken that out.

16 HONORABLE STEPHEN YELENOSKY: No, no, we
17 already have a sentence, "Based on the evidence that you
18 determine the credibility of and you determine the weight
19 of," just like clear and convincing and just like beyond a
20 reasonable doubt. Did it happen? Probably. Yes, I'm
21 convinced it happened, beyond any doubt it happened, so --

22 CHAIRMAN BABCOCK: Okay. So, Judge
23 Yelenosky, you proposed a vote, and everybody in favor of
24 taking out the sentence that says, "The term
25 'preponderance of the evidence' means the greater weight

1 of the credible evidence admitted in this case," right?

2 That's your vote proposal?

3 HONORABLE STEPHEN YELENOSKY: If you took
4 out the fourth and fifth sentence, that's my proposal.

5 MR. SCHENKKAN: It's the sentence you quoted
6 and the bracketed sentence.

7 CHAIRMAN BABCOCK: And the brackets, right.
8 Everybody in favor of that proposal, raise your hand.

9 Everybody opposed raise your hand. That
10 proposal fails by a vote of 8 in favor, 21 opposed. Let's
11 have lunch.

12 (Recess from 12:47 p.m. to 1:46 p.m.)

13 CHAIRMAN BABCOCK: All right, guys, we
14 skipped over an agenda item, the Dorsaneo/Duncan portion
15 of the agenda on Rule 301 and 26.1(a), and then the
16 uniform format manual, which we're going to push over a
17 couple of meetings, but, Sarah, are you going to take the
18 lead or is Bill?

19 HONORABLE SARAH DUNCAN: I will.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE SARAH DUNCAN: And I will because
22 Bill understands this stuff so completely that he might
23 get me confused. This was on the agenda for our last
24 meeting, and I passed because I had trouble understanding
25 why we were doing it again. Of course, some of you that

1 have been on the committee for a while, we've already been
2 through all of the post-verdict, post-judgment procedure
3 rules, and they are incorporated in Bill's recodification
4 draft of the Rules of the Civil Procedure.

5 However, there is a letter to Judge Hecht
6 that's back on the table, if you haven't read it -- a
7 letter from Judge Hecht to the committee asking us to look
8 at a proposal by the State Bar Rules Committee on getting
9 a definite time for filing a motion for judgment
10 notwithstanding the verdict. In answer to some of the
11 questions I've had, that's why this has come up again, is
12 whether to have a definite date by which a motion for JNOV
13 is to be filed; and, as I'm sure you know, that's sort of
14 only half the question that we discussed before. If it
15 has to be filed by that date, what's it going to do, is it
16 going to extend plenary power, is it not.

17 So my first thing that I would like a vote
18 on, Chip, is -- let me just say, what the committee did
19 before is twofold. A motion for JNOV became a motion for
20 judgment as a matter of law like in the Federal system,
21 and it had to be filed before judgment. If you wanted to
22 modify the judgment, you filed a motion to modify. That's
23 what the committee decided on, and of course, the motion
24 to modify could be filed within the period of plenary
25 power. That's what the committee decided on. That's

1 what's in the recodification draft right now.

2 The State Bar Rules Committee has proposed
3 that a motion for JNOV be filed -- required to be filed
4 within 30 days of judgment, which is, of course,
5 inconsistent with what the committee earlier recommended
6 in going through all of the post-verdict, post-judgment
7 rules. So the first thing I would like a vote on, Skip,
8 is -- and this was all controversial. We spent many
9 meetings on post-verdict, post-judgment rules because you
10 can't just change 301 and say 30 days. It impacts 329b.
11 It impacts the practice enormously.

12 So the first thing I'd like a vote on is do
13 we want to go back there or do we want to just take the
14 referral we've been given, which is inconsistent with this
15 committee's previous recommendation, and say we stand by
16 our previous recommendation?

17 CHAIRMAN BABCOCK: Okay. When did we --
18 when did we make this recommendation?

19 HONORABLE SARAH DUNCAN: I was just a little
20 girl then and I'm now just real close to 53, so it was
21 like '96, I think.

22 CHAIRMAN BABCOCK: Okay.

23 PROFESSOR DORSANEO: July -- the report to
24 the Supreme Court that I have in my clean version is dated
25 July 31st, 1996.

1 HONORABLE SARAH DUNCAN: As I said, I was
2 just a little girl.

3 PROFESSOR DORSANEO: And the transcript is
4 January and March of 1996 where all of the discussion
5 about this package occurred.

6 CHAIRMAN BABCOCK: Okay.

7 PROFESSOR DORSANEO: Much of this was done
8 by Chief Justice Guittard; although, I think Don Hunt,
9 many of you know, played a significant role as well.

10 CHAIRMAN BABCOCK: Okay. Judge Peeples.

11 HONORABLE DAVID PEEPLES: Could someone
12 state what the problem is to be fixed?

13 PROFESSOR DORSANEO: Well, there's another
14 -- I'll say a little bit more about it. There's another
15 aspect of what the Court Rules Committee wants this
16 committee to consider, and that's whether a 301 motion
17 would allow you to get on the longer track for the appeal,
18 the 90-day track rather than the 30-day track. I regard
19 that as kind of a separate issue. In one sense there
20 isn't anything that needs to be fixed in saying that --
21 well, a thing that perhaps needs to be fixed is for Rule
22 301 to just say when you can file this 301 motion. It
23 doesn't say at all. Perhaps that doesn't matter because
24 people know that it logically would be filed after verdict
25 and before judgment, because you're trying to get a

1 judgment in disregard of one or more jury findings, but
2 the rule doesn't -- the rule doesn't say that that's the
3 only time it could be filed, and for a time courts were --
4 courts were unsure what motions to modify were for, so it
5 was important to know whether you could file a 301 motion
6 after judgment, like in Federal practice. Okay.

7 But in a case called Lane Bank, following
8 other cases the Supreme Court said that anything you could
9 ask for in a 301 motion you can ask for in a motion to
10 modify the judgment, or at least the test articulated in
11 Lane Bank, you know, leads you to that result. So it's
12 clear that you could file, whatever you called it, a
13 motion to modify based upon a contention that one or more
14 of the jury findings are not supported by evidence,
15 whether or not you previously filed a 301 motion before
16 judgment.

17 So in a sense there's not a problem because
18 you can -- you can do the -- what is the equivalent of a
19 301 motion, a motion to modify after judgment. You do a
20 301 motion pretty clearly before judgment. If you did it
21 after judgment and called it a JNOV motion, presumably any
22 sane court would treat it for what it is, a motion to
23 modify, and it all works fine. Okay. All works out fine.

24 Now, the rule book also doesn't say what a
25 motion to modify is for. Okay. 329b(g), it is (g), isn't

1 it, Jody? When (g) was added into 329b by the committee
2 that worked on it -- and that was Quintin Keith, myself,
3 Justice Guittard, and Richard Clarkson, okay, some years
4 back -- we didn't say what it was for, okay, and that's
5 caused this problem that the courts had to catch up. So
6 in a sense there's no problem except for the fact that
7 people are confused about whether there's a problem, and
8 it might just make sense -- I mean, I looked at what the
9 Court Rules Committee suggested, and that's a way to clear
10 things up. Huh? It may not be the best way.

11 What this committee did full scale back in
12 1996 might deserve a closer look, and Jody did work on
13 that. There's a memo on the table over there dated
14 October 5, 2007, where Jody, you know, kind of worked on
15 the problem in more detail, looking at the Supreme Court
16 Advisory Committee's proposed amendments that ultimately
17 got incorporated into the recodification draft.

18 So it could go either way as far as I'm
19 concerned. It could go right to the Court Rules
20 Committee. It could go back to this and look to see
21 whether it needs further refinement in light of further
22 Supreme Court cases. I think it does. Do I think this is
23 good work? Yes, I think it's very good work. Clarence
24 Guittard probably wrote more rules for the State of Texas
25 than anybody else or participated in crafting them more

1 than anybody else.

2 CHAIRMAN BABCOCK: When you say "this is
3 very good" you're talking about the report from '96?

4 PROFESSOR DORSANEO: Yes, I'm talking about
5 the report. Yes.

6 CHAIRMAN BABCOCK: Okay.

7 PROFESSOR DORSANEO: But it's not perfect.

8 CHAIRMAN BABCOCK: Well, is your sense or
9 Sarah's sense that there's a problem that needs
10 correcting? I mean, is the State Bar Rules Committee
11 reacting to some real problem in the appellate practice or
12 not?

13 HONORABLE SARAH DUNCAN: I don't think
14 there's really a problem.

15 CHAIRMAN BABCOCK: Okay.

16 PROFESSOR DORSANEO: I think there's a -- I
17 think there's an issue about -- you know, whether you
18 should get on the 90-day track, okay, just by filing a
19 prejudgment --

20 CHAIRMAN BABCOCK: Prejudgment, yeah.

21 PROFESSOR DORSANEO: Prejudgment 301 motion.
22 You know, when I teach that, I suppose everybody does,
23 they say, "Well, we've got some post-verdict motions that
24 get you on the longer track and some that don't. You
25 better make sure you know which ones do and which ones

1 don't, because if you miss the train that's big trouble."

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE SARAH DUNCAN: I completely agree
4 some do and some don't, but unless we're going to solve
5 all the ones -- unless we're going to solve that
6 completely, I don't --

7 MS. CORTELL: My sense is that those that do
8 appeals all the time have figured it out. It's those who
9 do not. That's where the problem is. They look in the
10 rules, they go, "When do we file this motion and what is
11 the effect of it," and it's confusing. So I do think we
12 would be doing a service to the Bar to clarify it.

13 CHAIRMAN BABCOCK: Okay. Judge Peeples.

14 HONORABLE DAVID PEEPLES: As Bill has stated
15 the problems I think there are three possibles, the date
16 by which to file a motion for JNOV, and when you file one
17 either before or after judgment does it get you the extra
18 time, but if those are the problems, aren't those very,
19 very easy fixes as opposed to a page and a half of rewrite
20 that we've got before us? That's my question.

21 PROFESSOR DORSANEO: Yeah, that's -- it
22 depends on whether you want to tinker with this stuff --

23 HONORABLE DAVID PEEPLES: Yeah.

24 PROFESSOR DORSANEO: -- or actually improve
25 it in a more significant way; and the recodification

1 draft, I said I was going to talk -- like Chief Joseph of
2 some Indian tribe, you know, he said, "I'll fight no more
3 forever." I said, "I'm not going to talk about the
4 recodification again, I'm not going to mention it"; but it
5 has a lot of good things in it; and it's inevitable that
6 problems that were addressed then are going to continue to
7 come up, the same problems; and when I look at what the
8 State Bar did I say, "That's not bad," but it is a kind of
9 tinkering with a part of the rule book that needs more
10 remedial work. And that's my story.

11 CHAIRMAN BABCOCK: And you're sticking to
12 it.

13 PROFESSOR DORSANEO: Yeah.

14 CHAIRMAN BABCOCK: Hay, Pam, what do you
15 think?

16 MS. BARON: I can handle it either way.

17 CHAIRMAN BABCOCK: Is there any way we can
18 work some American thing, like love America thing in this
19 so Munzinger can get involved?

20 MR. MUNZINGER: America doesn't change
21 things often.

22 HONORABLE TRACY CHRISTOPHER: We don't want
23 to change the name of JNOV to something different because
24 of history and tradition.

25 CHAIRMAN BABCOCK: Now we're talking. Now

1 we're talking.

2 MR. WADE: Plain English.

3 CHAIRMAN BABCOCK: Sarah.

4 MS. BARON: It should retain Latin in order
5 to be American.

6 HONORABLE TRACY CHRISTOPHER: Because it's
7 just for the lawyers. We want that for the lawyers.

8 MR. LOPEZ: When we like it we call it
9 elegant, when we don't we call it archaic, so it just
10 depends on how you look at it.

11 CHAIRMAN BABCOCK: Richard.

12 MR. MUNZINGER: I do have a question for
13 Bill and Sarah. The distinction in the way that the
14 90-day periods run, is that based on policy or historical
15 happenstances? If it isn't based on policy, why would you
16 not have a uniform rule to remove the pitfalls to the
17 practitioners who don't specialize in this area?

18 HONORABLE SARAH DUNCAN: I completely agree.

19 MR. MUNZINGER: If it's based on policy then
20 honor the policy or at least articulate it to see why not.

21 HONORABLE SARAH DUNCAN: I think the Supreme
22 Court's opinion in NKG was entirely principled, but I
23 strongly disagreed that whether you have an evidentiary
24 hearing should determine whether a request for findings
25 and conclusions extends the appellate timetable, but it

1 does, and it is a principled opinion. It's do findings
2 and conclusions have a place at all in this procedure. If
3 you haven't had evidence, you're not supposed to have any
4 fact findings, so, yes, some of it's policy-based.

5 Some of it -- you know, really the things
6 that extend the appellate timetable I think under modern
7 practice is anything pretty much, except a request for
8 findings and conclusions following a nonevidentiary
9 hearing, no matter what you call it. Mr. Kirschberg, for
10 instance, called his a bill of review, but he filed it
11 within 30 days in the same cause number, and I said -- we
12 said, fine, you've extended the timetable, and that's why
13 I don't -- I think that's really by default what the rule
14 is, and if we want to write a rule that says that I'm with
15 you, but if we don't pull in findings and conclusions I
16 don't think we've really helped anybody very much.

17 And that's what my committee is -- wants, is
18 just tell us what you want us to do and we will do it, but
19 from our perspective this has already been done, and we
20 don't want to mess with what the committee's done unless
21 we're expressly told that is our charge.

22 CHAIRMAN BABCOCK: Bill.

23 PROFESSOR DORSANEO: The -- you're right,
24 somebody can mess up by not filing the thing after
25 judgment or filing it -- refileing it after judgment.

1 HONORABLE JANE BLAND: Was there a case that
2 says that?

3 PROFESSOR DORSANEO: The rule says it.

4 HONORABLE JANE BLAND: Your interpretation
5 of the rule says that.

6 PROFESSOR DORSANEO: Yeah, but to quote
7 somebody, you know, "words matter," you know, and the --

8 MR. WATSON: I'm not sure what you're
9 saying, Bill. I'm sorry. I'm tracking that last --

10 PROFESSOR DORSANEO: All right. Somebody
11 can screw up and file a 301 motion, they get it overruled,
12 then they think they're on -- somehow think that they're
13 on a 90-day. They don't file a motion for new trial.
14 Frequently they would. They think they're on the 90-day,
15 somehow think they're on the 90-day timetable because they
16 filed a post-verdict motion. Well, two post-verdict
17 motions don't get you -- two standard ones don't get you
18 the 90-day track, a motion for judgment and a motion for
19 judgment JNOV. Those two motions for judgment are not in
20 the package to get you on the 90-day track. That's one of
21 the things I teach my students, that they have to keep
22 firmly in mind that not everything that you might think
23 gives you the longer timetable does.

24 MR. WATSON: What about refileing it after
25 judgment? What was the point about that?

1 PROFESSOR DORSANEO: If you refile it -- if
2 you file it after judgment, okay, or for the first time,
3 or refile it, it should be treated as a motion to modify,
4 and a motion to modify gets you on the 90-day track.

5 HONORABLE SARAH DUNCAN: See, this was all
6 very -- I'm telling you, this was all very contentious
7 when we did it before. I hate all these names. I don't
8 care what people call it. I care what they want, and
9 Bill's got all this down pat. I promise you 99 percent of
10 the lawyers in the Fourth Court of Appeals don't, because
11 we rarely see the Bills or the, you know, whomevers.

12 CHAIRMAN BABCOCK: The Bills.

13 HONORABLE SARAH DUNCAN: And I just -- I
14 would love a world that's substantive, where if you file
15 it and you ask for a new trial and you filed it within the
16 time for asking for a new trial, you get the longer
17 timetable. You don't ask for a new trial, you don't. Or
18 you file it within 30 days, but you -- the idea of having
19 to call it a motion to modify on the last day of plenary
20 power because a new Supreme Court case has come out that
21 gives you the right to judgment as a matter of law, that
22 ought to be easy. We shouldn't be worried about whether
23 somebody calls it a motion to modify, a motion for JNOV, a
24 motion to win.

25 PROFESSOR DORSANEO: No, I don't care what

1 it's called either, except when we're talking about it
2 it's useful. It's like my children all have different
3 names. You know, it's useful to know who we're talking
4 about. George Foreman doesn't do it that way, but --

5 CHAIRMAN BABCOCK: Doesn't have to be that
6 way. Justice Bland.

7 HONORABLE JANE BLAND: I think I agree --

8 CHAIRMAN BABCOCK: And what are your
9 children's names by the way?

10 HONORABLE JANE BLAND: -- with David that if
11 the true problem is that we have some things that are
12 filed prejudgment that we think ought to extend the
13 timetable without having to be removed post-judgment or we
14 want to clarify that that's the case that they will extend
15 the timetable, why don't we just, you know, fix it like we
16 do with the notice of appeal and basically anything filed
17 that seeks a judgment or a modification of a judgment can
18 extend the appellate timetable?

19 HONORABLE SARAH DUNCAN: And I would --

20 HONORABLE JANE BLAND: And that would be
21 without trying to, you know, wholesale do judgments as a
22 matter of law, separately from motions to modify,
23 separately from -- you know.

24 HONORABLE SARAH DUNCAN: And a friendly
25 amendment --

1 HONORABLE JANE BLAND: And if they're filed
2 prejudgment, say they're -- treat them as filed as of the
3 day of the judgment.

4 HONORABLE SARAH DUNCAN: That was my
5 friendly amendment.

6 CHAIRMAN BABCOCK: Nina.

7 MS. CORTELL: We also have to have the
8 timetable addressed because there has been confusion over
9 the years. There was a Dallas court of appeals opinion at
10 one point that created confusion as to when you file this
11 motion. So in addition to whether it extends the
12 appellate timetable we also have the issue of just when is
13 it due.

14 MR. WATSON: You're talking about the 301
15 motion?

16 MS. CORTELL: Yes.

17 CHAIRMAN BABCOCK: As it stands now the 301
18 could be filed either before or after, right?

19 MS. CORTELL: Right, but there for a while
20 was a Dallas court of appeals opinion that created
21 confusion, and so people were saying conservatively you
22 need to file before judgment, and there's just been
23 confusion over the years, and I think it would be helpful
24 for practitioners. Again, those that do it all the time
25 know -- they work around it by using different labels,

1 perhaps, but it's -- the different children.

2 CHAIRMAN BABCOCK: Yeah. But as it stands
3 now if you file it before judgment, you don't get the
4 longer time period, right?

5 MS. CORTELL: Right.

6 CHAIRMAN BABCOCK: Skip.

7 MR. WATSON: The two things that I want to
8 be sure we are clear on, and this is where I can see
9 unsophisticated practitioners tripping and some
10 sophisticated tripping. The first is by changing the name
11 to motion to modify, I just wanted to be sure that the
12 language that we have on the timing issue, you know, makes
13 it crystal clear that if you don't tumble to the fact that
14 you're entitled to judgment as a matter of law, you know,
15 or that half of the judgment should go away, whatever it
16 is, that this is an immaterial issue that he's, you know,
17 entering judgment on, that when I read this rule as a
18 first, second, third-year practitioner and I realize that
19 somebody has taken a judgment in and that has been signed,
20 that I'm not out of luck, that I can still file that same
21 judgment as long as that judge has power over his
22 judgments, that I can walk in and there's nothing in this
23 rule that makes me think I'm screwed because they got
24 their judgment signed before I could get it in and say
25 "You've got to undo this."

1 That is critical, that no one loses their
2 rights because they think they're a day late on filing
3 this while the judge still has plenary power, and that's
4 -- if changing the names makes one person think they're
5 out of luck, I am against changing anything.

6 MS. CORTELL: Well, I think the State Bar
7 made it up to 30 days after judgment, right?

8 PROFESSOR DORSANEO: Uh-huh. Yes.

9 MS. CORTELL: So they've given you time
10 after judgment. I am also in favor of not requiring it
11 before judgment, but that's a separate issue.

12 MR. WATSON: Yeah.

13 MS. CORTELL: I am in favor of clarity.

14 MR. WATSON: I agree on that, but --

15 CHAIRMAN BABCOCK: Everybody who's opposed
16 to clarity raise your hands.

17 MR. WATSON: Now, just so this is on the
18 table and we're looking at it, the second issue is more
19 complex, but it's -- it is a gotcha, and that is I don't
20 know how many times I have seen -- and I don't want to
21 look back and see if I've ever done this because I will
22 bet I have, and that is in the prejudgment JNOV or motion
23 to disregard filing of putting in there "There was no
24 evidence of this," et cetera, et cetera, and then coming
25 in and saying "and in addition the evidence was factually

1 insufficient," and putting those words in there and then
2 thinking, okay, in my prayer for relief here, I've said
3 "factually insufficient," so I want to say alternatively,
4 "redo it," that when that pleading styled "a motion for
5 judgment NOV" or "motion for judgment as a matter of law,"
6 with that one or two little lines in there is overruled,
7 you know, my time has started.

8 I mean, you're in the situation where you
9 come in and file what you think is your motion for new
10 trial after that, and you're out of luck because it just
11 got overruled. It's not going to be overruled as a matter
12 of law. The 30 days are ticking from the moment the order
13 was entered on the JNOV. We've got to do something to
14 make sure that gotcha isn't there, because I think there
15 but by the grace of God go I, and I bet most of the people
16 in this room may have pulled something like that. We've
17 got to fix that.

18 CHAIRMAN BABCOCK: Bill.

19 PROFESSOR DORSANEO: You know, in the
20 Federal system, which the Rule 50(b) motion does extend
21 your time for perfecting appeal.

22 MR. WATSON: Correct.

23 PROFESSOR DORSANEO: It's one of those
24 things that does. Now, those Rule 50(b) motions are in
25 the Federal system -- that's the equivalent of our 301

1 motion.

2 MR. WATSON: Right.

3 PROFESSOR DORSANEO: Are themselves filed
4 after judgment. And, you know, that's a more simplified
5 system than what we have, although perhaps less logical to
6 have a motion for judgment as a matter of law after, you
7 know, after the judgment.

8 HONORABLE NATHAN HECHT: Motion for a
9 different judgment.

10 MR. WATSON: That's right.

11 PROFESSOR DORSANEO: Yes. But getting back
12 to Richard's question, is there some policy reason not to
13 have the longer track for that 301 motion filed
14 beforehand, I don't know that there -- if there is a
15 policy, I don't -- I've never heard anybody mention it.

16 HONORABLE SARAH DUNCAN: In the sense that
17 we want a speedy resolution of disputes, that policy
18 underlies all of them. I mean, it really does extend the
19 dispute when --

20 PROFESSOR DORSANEO: Yeah.

21 HONORABLE SARAH DUNCAN: -- you're talking
22 three months for a notice of appeal.

23 PROFESSOR DORSANEO: 30 days, 90 days, that
24 part of the -- the way we handle appeals it takes a long
25 time anyway.

1 HONORABLE SARAH DUNCAN: And I think most --
2 maybe not, but a lot of those cases are now accelerated
3 appeals anyway. Not a lot of the family law ones, though.

4 PROFESSOR DORSANEO: Well, even accelerated
5 appeals are not very accelerated in most places.

6 CHAIRMAN BABCOCK: Judge Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, even
8 though it doesn't make much sense to file a JNOV after, I
9 actually like the current system of filing it before or
10 after because I think sometimes a judgment will get signed
11 and the lawyer doesn't realize that the judgment is about
12 to get signed because there might not be an actual hearing
13 on a motion to enter judgment. Judgment might just get
14 sent in and might be signed. The judge looks at it and
15 says, "Well, yeah, that's what the jury did, I signed it."
16 So I kind of like the current system of allowing it to be
17 before and after, but I would be in favor of correcting
18 any time limit gotchas.

19 PROFESSOR DORSANEO: If it's done after it
20 technically would be a motion to modify. So --

21 MR. WATSON: I mean, exactly. Buddy's
22 carbon copy, not even a Xerox copy, but the carbon copy of
23 the same filing filed the day after judgment gets you the
24 time limit. I think the problems I've raised, at least
25 the second one, would be addressed by making any filing

1 requesting that that judgment not be entered exactly on
2 the verdict, whatever that is, any relief requested should
3 extend the time limits, whether it's before or after, what
4 you call it, or what the relief is. I mean, to me that's
5 just -- there's no excuse for saying that the same
6 document filed one day before and one day after gets
7 different relief.

8 MR. LOW: But what we used -- back in '83
9 what we would do is file a motion for judgment on the
10 verdict or alternative NOV because there might be an
11 omitted finding --

12 MR. WATSON: Right.

13 MR. LOW: -- that the court could find, you
14 know, because it was tried by consent or something, so
15 then we would have to -- you would have to file because
16 you felt you're entitled to a judgment, but if you're not,
17 you're entitled to one as a matter of law because it's
18 these things aren't -- aren't supported.

19 Bill, you were talking about the Federal
20 system. At one time didn't you have to make a motion for
21 instructed verdict --

22 PROFESSOR DORSANEO: Still do.

23 MR. LOW: -- at the end in order to process?

24 PROFESSOR DORSANEO: Yeah, you still do.

25 Nobody's proposing anything about that.

1 MR. LOW: No, I understand, but I just want
2 to be sure my memory was right.

3 MR. WATSON: Yeah, it's a renewed judgment.

4 MR. LOW: Yeah.

5 MR. WATSON: It's a renewed motion for
6 judgment as a matter of law that gets filed under 50(b).

7 MR. LOW: Right.

8 CHAIRMAN BABCOCK: Justice Bland.

9 HONORABLE JANE BLAND: Well, it seems like
10 if we end up saying that anything filed
11 post-verdict/prejudgment, you know, if we're going to
12 treat that as having been filed after judgment or at the
13 same time as the judgment, we're going to run into
14 extending the appellate timetable in almost every case
15 because, you know, lots of cases have motions for judgment
16 in them, and how can you distinguish between a motion for
17 judgment on a jury verdict than some other kind of motion?

18 You know, it would only be the cases where a
19 form of judgment is tendered without any argument or any
20 sort of "We need this much in prejudgment interest and we
21 need this much in attorney's fees" or whatever added to
22 it, and so that might be a problem; but it seems like if
23 you want to eliminate gotchas, the best way to do that
24 would be to make all the deadlines run from the date
25 certain, which would be the date of the judgment; and so

1 if it's something prejudgment then, you know, accelerate
2 it to the date of the judgment so that you count from the
3 date of the judgment and not worry about whether the
4 prejudgment thing was denied prejudgment, denied
5 post-judgment; and if you really want to get rid of
6 uncertainty, you would just run all types of deadlines
7 from the date of the judgment, which we do, I think, by
8 and large. 85 percent, 90 percent do that. So we only
9 have a few like the denial of a motion for new trial with
10 a signed order and, you know, a few things that don't.

11 CHAIRMAN BABCOCK: Okay. Yeah, Jody.

12 MR. HUGHES: I just had a question for Skip
13 to clarify on the second point that you raised about the
14 inclusion of factual sufficiency language. Are you
15 raising the *In Re: Brookshire* problem there?

16 MR. WATSON: Not directly.

17 MR. HUGHES: But kind of touching on the
18 same?

19 MR. WATSON: Yeah.

20 MR. HUGHES: Okay.

21 HONORABLE TOM GRAY: Since those of us don't
22 understand that code, could you explain what the *In Re:*
23 *Brookshire* was?

24 CHAIRMAN BABCOCK: I'm not sure Skip
25 understands it, but --

1 MR. WATSON: It's a pending case and it --

2 HONORABLE TOM GRAY: Oh, okay. Sorry about
3 that. Just let it go.

4 HONORABLE SARAH DUNCAN: Actually, the
5 motion for prehearing was overruled.

6 MR. WATSON: Was it?

7 HONORABLE SARAH DUNCAN: It's -- a motion
8 for judgment notwithstanding the verdict was filed, but it
9 included a request for a couple -- it included a request
10 for a new trial, charge error. They had a hearing on the
11 JNOV motion. The trial judge says, "I'm going to deny the
12 motion for JNOV, but I'd like you to go ahead and file
13 your full blown motion for new trial and then we'll decide
14 that." Denies the motion for JNOV in an order, but it
15 says -- and I am not going to say it was a typo or what it
16 was, but it says "Motions." A motion for new trial is
17 then filed within 30 days of the date that judgment is
18 signed. That was treated by the court as an amended
19 motion for new trial so that plenary power was not
20 extended so that by the time the trial court granted the
21 motion for new trial plenary power had expired.

22 HONORABLE TOM GRAY: That was the case that
23 basically said you just get one motion for new trial.

24 MR. WATSON: That's correct.

25 HONORABLE JANE BLAND: Or if you amend you

1 need to amend within the --

2 MR. WATSON: Within the 30 days.

3 HONORABLE JANE BLAND: Yeah, within the 30
4 days.

5 PROFESSOR DORSANEO: That's the case that
6 follows Risher, right? They're interpreting the language
7 that once the motion for new trial is ruled on you're
8 done, which is changed in here.

9 CHAIRMAN BABCOCK: Anybody else? Okay.
10 Justice Hecht, solve this. Well, Pam's got a solution.

11 MS. BARON: Well, this was something that
12 we proposed a long time ago. Bill will remember, but we
13 said extend the timetable in all cases and then you won't
14 have any of these problems.

15 PROFESSOR DORSANEO: I've never understood
16 why we have two tracks.

17 HONORABLE NATHAN HECHT: Oh, we had a
18 long --

19 MS. BARON: And we also save the appellate
20 courts work because when they did their jurisdictional
21 checks, anything that came in 30 days after judgment they
22 wouldn't have to dig around and see what kind of
23 post-trial motion was filed and when it was filed and what
24 kind of motion it was and go through all the stuff we've
25 just been talking about, so it would save the appellate

1 courts a lot of work.

2 HONORABLE NATHAN HECHT: The committee had a
3 long discussion about this the last time it came up and
4 decided to keep the two-track, the 30 days and 90 days,
5 but I think the question still lingers is that really
6 worth it. I mean, do we shorten any appeals measurably by
7 by keeping the 30-day track as opposed to all of the work
8 that gets done in the appellate courts trying to check the
9 jurisdiction and the consternation of the lawyers trying
10 to decide whether it extends it or not. I mean, do we
11 gain anything by the two tracks that's really -- that
12 outweighs the prejudice?

13 CHAIRMAN BABCOCK: So how would it work,
14 that the court has plenary power for 90 days and then
15 after that, you know, loses it, and that's it?

16 HONORABLE NATHAN HECHT: Well, you'd have to
17 set the deadline so they make sense, but nothing would
18 extend anything. If you're going to appeal, you have this
19 long. If you're going to file a motion, you have this
20 long, call it anything you want to. If you're going to
21 respond to a motion or file a responsive motion, you have
22 this long; and once all those periods close, it won't --
23 and then you go forward, but it won't depend on whether
24 you called it a motion for new trial or JNOV or judgment
25 or modify or whether you filed it before or after. I

1 mean, it would just be a simple time during which stuff
2 has to be done and can be ruled on, and then after that
3 you go to the court of appeals.

4 CHAIRMAN BABCOCK: Sarah.

5 HONORABLE SARAH DUNCAN: I'm going to speak
6 for our absent member, Mr. Orsinger.

7 CHAIRMAN BABCOCK: Where is Orsinger?

8 HONORABLE SARAH DUNCAN: I don't know.

9 PROFESSOR DORSANEO: Of course, he's not in
10 favor of complexity in any way, shape, or form.

11 HONORABLE SARAH DUNCAN: I would be all in
12 favor of such a system if a higher percentage of judgments
13 were appealed. A very small percentage of judgments are
14 appealed, and what that system would end up doing is in
15 addition to extending the appellate timetable for those
16 cases in which there is an appeal, it's going to delay
17 finality of the judgment in those cases in which there
18 isn't an appeal. Most of the cases in the system are
19 family law cases, which is why I say I'm going to speak up
20 for our absent member, Mr. Orsinger, and it's my memory,
21 which is not very good these days, but it's my memory that
22 that's what was the convincing factor in our discussion
23 last time to not have an extended appellate timetable for
24 all types of cases. Civil cases.

25 CHAIRMAN BABCOCK: Justice Hecht is nodding

1 his head in affirmation.

2 HONORABLE NATHAN HECHT: Yep. That was the
3 discussion. Yep.

4 HONORABLE TOM GRAY: It's odd that I was
5 also going to speak for Richard but on another topic,
6 because Richard would also raise at this point we don't
7 have two tracks, we have a minimum of three tracks because
8 we have the accelerated appeals that are in an entirely
9 different group, many of which are termination cases.

10 HONORABLE SARAH DUNCAN: So let's just make
11 them all accelerated.

12 HONORABLE TOM GRAY: I think that would
13 solve everything.

14 MR. SUSMAN: No, let's all speak for
15 Richard.

16 CHAIRMAN BABCOCK: Got anything for him to
17 say?

18 MR. SUSMAN: No, I forgot.

19 HONORABLE TOM GRAY: In addition to the
20 accelerated, the regular 30-day, and the 90-day, you also
21 have lots of other timetables that are affected in your --
22 like in election contests and whether special periods of
23 time to file your notice of appeal. One sweeping rule
24 change is not going to catch all of those, so --

25 PROFESSOR DORSANEO: Mr. Chairman?

1 CHAIRMAN BABCOCK: Yeah, Bill.

2 PROFESSOR DORSANEO: I think we ought to
3 look at the Court Rules Committee, what they propose.
4 They worked on it, they discussed it. You know,
5 without -- if we're not going to go back and review what
6 we did before, if that's really not going to happen, then
7 why don't we look at what the Court Rules Committee is
8 proposing and see if that's a good idea?

9 CHAIRMAN BABCOCK: You got an opinion on
10 that?

11 PROFESSOR DORSANEO: I think it improves
12 Rule 301, and I have a less strong opinion about the
13 adjustment to 26.1(a), but I think the world might be a
14 better place if you got on the 90-day track for when you
15 filed a motion for JNOV or a -- or as I call them, I just
16 call it a 301 motion because it covers a couple of things.

17 CHAIRMAN BABCOCK: Okay. Anybody else have
18 opinions about whether the State Bar Rules Committee
19 recodification, if I can use that word, of Rule 301 is a
20 helpful thing or hurts or it's neutral?

21 MS. CORTELL: I agree that it's helpful,
22 along the lines I've spoken to before, which is I think it
23 provides some guidance where we haven't before.

24 CHAIRMAN BABCOCK: Okay. And what's your
25 opinion, Nina, about the proposed change to 26.1(a)?

1 MS. CORTELL: I would agree with it.

2 CHAIRMAN BABCOCK: You think that's helpful,
3 too?

4 MS. CORTELL: Yes. Yes.

5 CHAIRMAN BABCOCK: All right. Sarah.

6 HONORABLE SARAH DUNCAN: I'm opposed to it
7 strongly. I don't see any reason that if a motion for
8 JNOV is filed after 30 days on a point of law that would
9 result in a different judgment that that is -- that has
10 already been rendered, that that would be considered
11 untimely, and it would be under this rule, and that makes
12 absolutely no sense to me.

13 CHAIRMAN BABCOCK: Sarah, to be clearer,
14 you're commenting about the proposed amendment to 26.1(a)?

15 HONORABLE SARAH DUNCAN: No. I'm talking
16 about --

17 CHAIRMAN BABCOCK: 301?

18 HONORABLE SARAH DUNCAN: -- proposed 301,
19 subsection (2), third sentence, "Such motions and any
20 amended motions shall be filed not later than the time for
21 filing a motion for new trial under Rule 329b."

22 CHAIRMAN BABCOCK: Okay. I'm with you.

23 HONORABLE SARAH DUNCAN: And it is the time
24 for filing motions for new trial under 329b that caused
25 the problem in Voss -- Brookshire.

1 CHAIRMAN BABCOCK: Okay. Professor Hoffman,
2 you got an opinion?

3 (Professor Hoffman shakes head.)

4 CHAIRMAN BABCOCK: No opinion. Pam? Pam
5 Baron, you got an opinion?

6 MS. BARON: I'm reading it now.

7 CHAIRMAN BABCOCK: Thinking about it. Skip,
8 you always have opinions.

9 MR. WATSON: That -- the sentence that Sarah
10 pointed out was the first point I made earlier. I mean,
11 I'm very much opposed to that. I think as long as the
12 court has power it ought to be able to exercise that power
13 and recognize that the judgment it has entered is wrong,
14 and it should be able to do that on a motion by somebody
15 who woke up after judgment.

16 CHAIRMAN BABCOCK: Okay. Bill.

17 PROFESSOR DORSANEO: Wait, that's a separate
18 329b problem. That's the problem in 329b that says that
19 you don't get to amend your motion for new trial once the
20 motion for new trial that was filed originally is ruled
21 upon. That's a bad part of 329b. That codified the
22 Dallas court's opinion in *Risher vs. Risher*, and Justice
23 Guittard couldn't be talked out of that provision, and
24 that's easily fixed by just saying -- just by crossing
25 things out in 329b, would solve your problem I think.

1 MR. WATSON: Then do it.

2 PROFESSOR DORSANEO: But it's not -- the
3 reference to 329b's 30-day timetable --

4 MR. WATSON: I understand.

5 PROFESSOR DORSANEO: -- okay, is not a bad
6 idea and --

7 HONORABLE SARAH DUNCAN: In your opinion.

8 PROFESSOR DORSANEO: -- independently of
9 that -- in my opinion, yes. That's what I usually go by.

10 MS. CORTELL: Well, I think there's a safety
11 in 329b(e), right, if you want to keep it? I do think
12 there's something to a timetable, and I do think the 30
13 days has worked generally for motions for new trial and,
14 therefore, should work generally for JNOV motions and
15 then, again, I think there's a safety catch in 329b(e),
16 and you could maybe extend that here.

17 CHAIRMAN BABCOCK: Professor Hoffman.

18 PROFESSOR HOFFMAN: I guess my comment is at
19 10,000 feet. I don't -- I'm sufficiently convinced by the
20 conversation that there is enough law with various places
21 in the rules or at least enough to reconsider various
22 places in the rules that we ought not to think about
23 making a change that might fix some part but not all of it
24 or produce unimportant consequences or unfair consequences
25 in other places.

1 So I guess I'm a little bit unsure why, to
2 me, the question is should we do this and only this, and
3 in light of the conversation that's been going on for a
4 while, all of which is not at the level of 10,000 feet,
5 it's been very specific, and frankly, I've missed most of
6 it, I don't -- I'm convinced that we ought not to make one
7 change, that that would be the wrong way to go.

8 CHAIRMAN BABCOCK: Professor Albright, do
9 you have a thought about this?

10 PROFESSOR ALBRIGHT: Well, I always think --
11 I'm like Professor Hoffman. I think it's a bad idea to
12 make one little change in a rule when there's so many
13 things wrong with it. I would favor looking at all these
14 rules again and proposing a more blanket change.

15 PROFESSOR DORSANEO: Well, then this would
16 be the place to start.

17 CHAIRMAN BABCOCK: Dare we say it?

18 PROFESSOR ALBRIGHT: And the recodification
19 draft is the best place to start with that effort.

20 CHAIRMAN BABCOCK: Pam, any thoughts?

21 MS. BARON: Well, I'm still trying to
22 understand Sarah's objection to that sentence.

23 CHAIRMAN BABCOCK: Okay. Well, we'll come
24 back to you.

25 MS. BARON: Are you saying that in some

1 circumstances under this proposed rule that the JNOV would
2 not extend the appellate timetable? Is that what you
3 said?

4 HONORABLE SARAH DUNCAN: No. I'm saying
5 that it's -- it has to be filed within 30 days, and any
6 amended motion for JNOV has to be filed within 30 days,
7 and I just think that's ludicrous. If a court still has
8 plenary power 104 days out from the judgment, why isn't a
9 motion for JNOV that decisively establishes that the
10 judgment ought to be exactly the opposite of what it is --
11 I think that's really timely, and it needs to get filed,
12 and no one should be dissuaded from filing it. I mean,
13 you can talk to sophisticated practitioners of appellate
14 law, and they will tell you, "Well, you can always file a
15 motion for new trial, it just won't extend the appellate
16 timetable." Well, that's great if you happen to be a
17 sophisticated appellate practitioner and you know that,
18 and the same would be true for a JNOV motion, but any
19 normal person reading this rule is going to say, "I can't
20 file a JNOV motion because I'm past 30 days out from the
21 judgment."

22 PROFESSOR DORSANEO: Yeah.

23 HONORABLE SARAH DUNCAN: And that to me is
24 just ludicrous.

25 MS. BARON: I don't have a problem with

1 that, though, because, I mean, the concept of a JNOV
2 generally is that you're not attacking a judgment, that
3 you're attacking the verdict, and traditionally it was
4 meant to be filed before a judgment, so because you're
5 attacking the verdict you're not attacking the judgment,
6 and I think that's why it doesn't extend the timetable,
7 because the theory was you're looking at attacks on the
8 judgment itself once the judgment is rendered before you
9 extend the appellate timetable.

10 That's gotten a lot of -- broken down
11 because we're now extending for findings of fact,
12 conclusions of law, but it strikes me that having a 30-day
13 outside limit on a JNOV is not that offensive, because
14 that's not really what its original idea was. The
15 original idea was that it was attacking the verdict, not
16 the judgment. We have lots of ways to attack the
17 judgment. So --

18 CHAIRMAN BABCOCK: Nina.

19 MS. CORTELL: I would agree with that and to
20 Judge Christopher's point earlier. I mean, in a perfect
21 world if there's not a rush to judgment you do file your
22 JNOV and have it heard at the same time as the other side
23 is moving for judgment on the verdict. The problem,
24 though, often is that that judgment does get entered, it
25 gets submitted and entered, and you need a quantified

1 period of time to get your JNOV on file, and at least
2 having done this now for some 30 years, I mean, you can
3 typically do that within 30 days. I mean, it's typically
4 enough time. It's no harder, frankly, than the motion for
5 new trial in my judgment when you have to look at all the
6 different things you might want to perfect for an appeal.

7 To Sarah's point, if we want to clarify
8 that, you know, there are yet other arguments you can
9 raise, they just don't extend the timetable, I think that
10 will fall under the general category, the 329b(e)
11 category. I don't have the rule right in front of me, but
12 my understanding is over the years I've seen the
13 subsequent time period used for other arguments that are
14 raised after the 30-day period.

15 CHAIRMAN BABCOCK: Okay. Anybody have any
16 other thoughts? Buddy?

17 MR. LOW: No, I just want it simple enough I
18 can understand it.

19 CHAIRMAN BABCOCK: Well --

20 MR. LOW: That's all I want.

21 CHAIRMAN BABCOCK: -- we may not get there,
22 Buddy, but --

23 MR. LOW: Oh, you don't want it that simple?
24 All right. I can understand.

25 HONORABLE TRACY CHRISTOPHER: We don't want

1 to put the appellate lawyers out of work.

2 CHAIRMAN BABCOCK: That's right. Okay.
3 Justice Hecht, where do we go from here? Or Jody? Either
4 one.

5 HONORABLE NATHAN HECHT: Well, we passed on
6 the Court Rules Committee's proposal just because we pass
7 them on generally to the committee to get its view of it,
8 and we can look further at it. I think the Court would be
9 interested in the recommendation whether to look further
10 at it, no, to stay with the past recommendation to revisit
11 the area, or what should we do.

12 CHAIRMAN BABCOCK: Okay. Yeah.

13 HONORABLE NATHAN HECHT: Given the passage
14 of time should we try to fix this whole area or should we
15 leave it alone?

16 HONORABLE SARAH DUNCAN: There are three
17 choices, Judge.

18 CHAIRMAN BABCOCK: Yeah, go ahead and frame
19 it, frame the issue, Sarah.

20 HONORABLE SARAH DUNCAN: No change.

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE SARAH DUNCAN: Revisit all.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE SARAH DUNCAN: Adopt the Court
25 Rules Committee's rule for this particular problem.

1 CHAIRMAN BABCOCK: Yeah. And we may get a
2 false positive if we consider all three at one time, so
3 wouldn't it be smart to vote on --

4 HONORABLE SARAH DUNCAN: No change versus
5 change.

6 CHAIRMAN BABCOCK: -- whether or not the
7 State Bar Rules Committee proposals are a good idea in
8 view of this committee?

9 HONORABLE SARAH DUNCAN: That's one thing we
10 can vote on.

11 CHAIRMAN BABCOCK: Okay. Richard.

12 MR. MUNZINGER: Given the three alternatives
13 that she articulated, wouldn't it make sense to vote first
14 on whether you would visit all?

15 HONORABLE SARAH DUNCAN: Change or no
16 change.

17 MR. MUNZINGER: If you're going to revisit
18 everything, you're obviously going to consider what the
19 State Bar Rules Committee did and take a look at what they
20 did in 1996 and come forward. It would seem to me that
21 the first vote ought to be on that issue.

22 CHAIRMAN BABCOCK: Okay. Is that okay with
23 you? All right. How many people think we should revisit
24 the entire area, not limit it to just 301? Everybody
25 raise your hand.

1 All right. How many people are opposed to
2 that? That passes by the vote of 19 to 1. And --

3 HONORABLE SARAH DUNCAN: Now ask about
4 the --

5 CHAIRMAN BABCOCK: Huh?

6 HONORABLE SARAH DUNCAN: I'm sorry. Would
7 you mind asking now about the Court Rules Committee
8 proposal?

9 CHAIRMAN BABCOCK: Yeah, that's where I
10 thought we would go next. How many people think that the
11 proposal by the Court Rules Committee regarding 301 and
12 then the rules that would follow -- the changes in the
13 rules that would follow that, 26.1(a) and 53.7(a), how
14 many are in favor of that?

15 HONORABLE DAVID GAULTNEY: Can I ask a
16 question on that? I thought that the proposal was to
17 revisit the whole issue and come forward with a proposal
18 that may or may not incorporate this proposal, but --

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE DAVID GAULTNEY: -- I'm not sure.
21 I heard some concern of why should we vote in favor of
22 this proposal when there might be something better that
23 could be --

24 CHAIRMAN BABCOCK: Yeah. Hayes.

25 MR. FULLER: My response to that is we may

1 not get the whole area revisited in my lifetime;
2 therefore, I would be in favor of taking what we can get,
3 and I agree with what Professor Dorsaneo said earlier, and
4 that is their approach to this specific issue is a good
5 one. So I think it's important we take that vote and find
6 out.

7 CHAIRMAN BABCOCK: Okay. So let's take that
8 vote and see -- yeah, Pam.

9 MS. BARON: I think you can break it down a
10 little more narrowly, just do we want a time limit for
11 JNOVs. Isn't that the basic question that's presented in
12 this rule?

13 MS. CORTELL: There's two questions, when do
14 you file and the effect on the timetable.

15 MS. BARON: Right, and does it affect the
16 appellate timetable, right.

17 CHAIRMAN BABCOCK: Okay. How are we going
18 to -- what vote do you want to take?

19 HONORABLE SARAH DUNCAN: Should a motion
20 for -- who knows what we would even call it, a motion for
21 JNOV be -- must a motion for JNOV be filed within 30 days
22 of the date of the judgment.

23 CHAIRMAN BABCOCK: So everybody who is in
24 favor of changing the rules to require a motion for
25 judgment notwithstanding the verdict you file within 30

1 days of the judgment. Is that what we're voting on?

2 HONORABLE SARAH DUNCAN: Yeah.

3 HONORABLE DAVID GAULTNEY: Maybe I made a
4 mistake by objecting to the first vote, because, no, I
5 thought that this rule as it was constructed was designed
6 to deal with a problem, and it had several parts to that
7 problem, and so I'm not sure just carving one section out
8 really voices the opinion of the group as to whether -- if
9 we're not going to do anything else, this rule would be
10 preferable, and I would like to see a vote on that, as
11 opposed to --

12 CHAIRMAN BABCOCK: The State Bar rule
13 doesn't -- I may be misreading it, Sarah, but doesn't it
14 permit this motion, a 301 motion, to be filed both before
15 or/and after judgment?

16 PROFESSOR DORSANEO: Uh-huh.

17 HONORABLE TRACY CHRISTOPHER: Yes.

18 HONORABLE SARAH DUNCAN: Yeah.

19 MR. WATSON: Within 30 days.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE SARAH DUNCAN: Within 30 days.

22 CHAIRMAN BABCOCK: Well, within the time
23 period permitted for a motion for new trial. So shouldn't
24 that be what we're voting on or not?

25 HONORABLE SARAH DUNCAN: Those two don't

1 want to.

2 HONORABLE DAVID GAULTNEY: Well --

3 HONORABLE SARAH DUNCAN: I think Justice
4 Gaultney's vote to revisit all --

5 MR. LOW: What if plenary power hadn't ended
6 and the judge is beyond that, but he still has plenary
7 power and he says, "Wait a minute, I'm going to
8 reconsider. I want you to file a motion." I think it
9 ought to be granted. What then -- you can't do it because
10 -- even though the court has power to do it?

11 HONORABLE SARAH DUNCAN: The rules says you
12 can.

13 HONORABLE DAVID GAULTNEY: Well, see, that's
14 my problem. I think the rule --

15 PROFESSOR DORSANEO: This one says that.

16 HONORABLE DAVID GAULTNEY: I think the rules
17 ought to be considered. I'm in favor of that, for what
18 it's worth. If we can't get that, I like this rule like
19 it's structured, and I can -- I can live with the 30-day
20 deadline because it seems to fit the structure of the
21 whole rule proposal as the rules are currently, but if
22 you're asking me do I really like that one provision you
23 have to file a JNOV within 30 days and any amended JNOV
24 within 30 days, no, I'll vote against that if that's the
25 only issue, but that doesn't mean I'm against this whole

1 proposed rule as it is in total written. So my proposal
2 was to get a sense of the committee it might be better to
3 vote on the total rule as it's presented.

4 PROFESSOR DORSANEO: That problem, the
5 problem about not being able to file one out of time and
6 having the trial judge, you know, not empowered to
7 consider it and grant it is a case law problem. That's
8 the Moritz case. That's a bad case, okay. It's not --
9 329b does not really say that. That's a case law
10 interpretation issue related to a motion for new trial
11 practice, so, yeah, I think that ought to be part of
12 what's reconsidered.

13 HONORABLE DAVID GAULTNEY: Right.

14 CHAIRMAN BABCOCK: Nina.

15 MS. CORTELL: Chip, this goes toward -- I
16 think we need a slightly more comprehensive look, but what
17 I was referring to is 329b(e) which currently allows the
18 court to act within its plenary jurisdiction if a timely
19 filed motion for new trial has been filed. Okay. So even
20 after the 30-day period and after overruling there is time
21 for the judge under Buddy's scenario --

22 MR. LOW: But to grant a new trial, but not
23 judgment NOV.

24 MS. CORTELL: No, what I'm saying is you
25 could take the 329b(e) concept and extend it to the JNOV

1 scenario, and that it speaks toward a more comprehensive
2 look. In other words, take the concepts we're talking
3 about, integrate them, and come back with a slightly more
4 complete proposal. I am generally okay with what's been
5 proposed. I just think it needs to be thought through a
6 little bit more and extended out a bit more. But that's
7 what I'm talking about exactly, so that might meet Sarah's
8 concern that if a belated matter of law point is
9 identified the court would have power to act upon it as
10 long as it has plenary jurisdiction.

11 CHAIRMAN BABCOCK: Okay. It's obvious that
12 some people like the State Bar, these two rules, and some
13 people don't, so let's find out who's in what camp.

14 MS. CORTELL: What I don't know if you want
15 to do is break it out because there is several concepts in
16 here. My problem is it doesn't do as much as it needs to
17 do, but I'm in agreement with a lot of it.

18 CHAIRMAN BABCOCK: Well, if the vote is
19 we're going to study the whole area, and if the Court
20 comes back and says, "Yeah, we've heard you, and so now go
21 do that," then the broad thing will be decided I guess,
22 but if it's a matter of just dealing with 301 and 26.1(a)
23 in the way that the State Bar Rules Committee has talked
24 about it then that's a different option that we're giving
25 the Court.

1 MS. CORTELL: Okay.

2 CHAIRMAN BABCOCK: So everybody that's in
3 favor of the proposed rule by the State Bar Rules
4 Committee, that being 301 and 26.1(a), raise your hand.

5 MR. LOW: As written.

6 CHAIRMAN BABCOCK: As written. As written.
7 Raise your hand. Jim, is your hand up?

8 MR. PERDUE: Yeah.

9 CHAIRMAN BABCOCK: Everybody opposed?

10 MS. BARON: How about with slight
11 modification, the Nina proposal?

12 MS. CORTELL: Well, that's the problem. I
13 think more needs to be done.

14 CHAIRMAN BABCOCK: Well, as written, five
15 people say "yes" and nine say "no," the Chair and a bunch
16 of other people not voting, so I don't know if that helps
17 anybody, but -- Jody looks puzzled.

18 MR. HUGHES: Well, I guess I'm not sure that
19 these votes captured the -- for the people who were voting
20 for the larger examination of the area.

21 MR. LOW: If you voted for the general
22 concept with possible modifications, a lot of people had
23 voted against it would have voted for it.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. LOW: So then we have to see what the

1 modifications, but with that --

2 PROFESSOR DORSANEO: Would it be useful to
3 identify what the bigger picture would involve?

4 PROFESSOR ALBRIGHT: Yeah. That's our
5 problem down here. We're not sure what the concept is.
6 There have been so many.

7 CHAIRMAN BABCOCK: Well, the bigger picture?

8 PROFESSOR ALBRIGHT: We know the big
9 picture, but what is the smaller concept that we're voting
10 on that's in the court rules draft? That's what we're
11 confused about.

12 CHAIRMAN BABCOCK: Well, I mean, what the
13 State Bar has proposed, the rules committee has proposed
14 text for Rule 301, and they've proposed text for Rule
15 26.1(a), and so either you like that or you don't like it,
16 and if you kind of like it then I suppose that's a third
17 category, but, yeah, just --

18 PROFESSOR ALBRIGHT: So I guess is the
19 issue -- we've been talking -- I've been listening to
20 Sarah, and so is the issue that what this rule is doing is
21 saying that if a motion for new trial is filed day two
22 after the judgment, so your plenary power deadlines have
23 extended but no other motions are filed until day 32 and
24 there's a JNOV motion filed and if the trial judge granted
25 that JNOV motion then that would be reversible error on

1 appeal because the court did not have power to grant that
2 JNOV that that was filed on day 32?

3 HONORABLE SARAH DUNCAN: Right. Well, they
4 wouldn't. His plenary power hadn't been extended.

5 PROFESSOR ALBRIGHT: No, because I said the
6 motion for new trial was filed on day two.

7 HONORABLE SARAH DUNCAN: Oh, I'm sorry. I
8 was looking for my little red pen.

9 PROFESSOR ALBRIGHT: We need a white board
10 here.

11 HONORABLE SARAH DUNCAN: If plenary power
12 has been extended --

13 PROFESSOR ALBRIGHT: Yeah.

14 HONORABLE SARAH DUNCAN: -- certainly the
15 court would have the power --

16 PROFESSOR ALBRIGHT: To grant it.

17 HONORABLE SARAH DUNCAN: -- to modify its
18 judgment.

19 PROFESSOR ALBRIGHT: Right.

20 HONORABLE SARAH DUNCAN: On day 32.

21 PROFESSOR ALBRIGHT: Right. So that's why I
22 don't understand what the point of this change is in the
23 Court Rules Committee draft.

24 HONORABLE SARAH DUNCAN: Well, this, as it
25 now stands, there is no time limit for filing a motion for

1 JNOV.

2 PROFESSOR ALBRIGHT: Well, except the
3 presumed one that you have to file it within plenary
4 power. I mean, you couldn't file it on day 32 if there
5 hadn't been a previous motion for new trial.

6 HONORABLE SARAH DUNCAN: Right, and you
7 couldn't file it on day 106.

8 PROFESSOR ALBRIGHT: Right.

9 HONORABLE SARAH DUNCAN: But the way it is
10 right now you can file it at any time within -- you can
11 file it at any time, and the court has power to act on it
12 whenever the court has power.

13 PROFESSOR ALBRIGHT: Power to act.

14 HONORABLE SARAH DUNCAN: To act.

15 PROFESSOR ALBRIGHT: So what this just
16 has -- so, again, I don't understand the point of this
17 rule. Just because it says -- it puts it in black and
18 white that you have to file your motion for new -- I mean,
19 your JNOV within a time period that you have to file
20 your -- okay. And is that so --

21 MS. CORTELL: Over the years there's been
22 confusion over that. At least for a period of time we had
23 a Dallas court of appeals opinion that basically said you
24 had to file it within 30 days.

25 PROFESSOR ALBRIGHT: Or -- or what?

1 MS. CORTELL: Or you didn't have a right to
2 file. You know, I'm just saying it's an area of
3 confusion. I think that appellate practitioners know how
4 to wire around that by labeling their motion the right way
5 or whatever, but --

6 PROFESSOR DORSANEO: I don't think the
7 answers to those questions are so clear.

8 PROFESSOR ALBRIGHT: Well, see, that's why I
9 can't vote for this, because it seems like there are all
10 these other issues involved in this. To me this is a fix
11 that it may fix that one problem, but it puts it in the
12 mess that everything else is in.

13 MR. WATSON: Exactly.

14 CHAIRMAN BABCOCK: What you're saying is
15 Lonny's saying, which is either you've got to fix the
16 whole thing, but don't put a Band-aid on it because the
17 Band-aid may open up other wounds that you don't even
18 understand.

19 PROFESSOR ALBRIGHT: Yeah. I think what
20 it's doing is it's putting this in the same wound that
21 everything else is in.

22 CHAIRMAN BABCOCK: Yeah. Okay. Justice
23 Bland.

24 HONORABLE JANE BLAND: Could we at least
25 have a vote on Rule 26.1(a) that the State Bar Rules

1 Committee proposed because I don't know that anybody has
2 said that that's not a good idea, and I think that cures a
3 lot of the problem. So, you know, if everybody wants to
4 go back either to the drawing board or go back and use the
5 State Bar's proposed revisions to 301 and as the place to
6 begin with and make some modification to it, great, but
7 why wouldn't we go ahead and fix 26.1 to make it perfectly
8 clear that the notice of appeal can be filed 90 days if
9 there's a motion for JNOV filed?

10 CHAIRMAN BABCOCK: Okay. Buddy.

11 MR. LOW: Chip, from what I understand there
12 have been several ask the question of what 301 is doing.
13 Without looking at all that the deadlines and terms they
14 first have a section that 301 doesn't have that addresses
15 judgments. They have a section that addresses motions for
16 judgment on the jury verdict and then motions for judgment
17 as a matter of law. They break it -- or to modify the
18 judgment, I'm sorry. So they break it down, and you can
19 put those different deadlines or different things, but
20 that's what I see they've done, is segregate it, where 301
21 doesn't. They've got different categories, 301 in (a),
22 motion for judgment on a verdict; (b), motion for judgment
23 as as a matter of law, JNOV, and then motion to modify,
24 and within that framework is what I see. We don't have to
25 necessarily agree with the framework, but that's the

1 concept that I was voting on, not the terms, which
2 clarifies some things. You can clarify things within
3 those terms.

4 HONORABLE SARAH DUNCAN: Chip?

5 CHAIRMAN BABCOCK: Yeah, Sarah.

6 HONORABLE SARAH DUNCAN: The problem I have
7 with Justice Bland's, just looking at 26.1, is that it
8 incorporates the notion of a timely filed document, and if
9 a motion for JNOV can be filed at any time within the
10 court's plenary power then you won't know if you're under
11 the extended timetable until after the JNOV is filed,
12 which may well be more than 90 days after judgment, and
13 you've missed the time to file your notice of appeal.

14 HONORABLE JANE BLAND: But that's not a
15 problem that doesn't already exist, and that's just
16 because --

17 HONORABLE SARAH DUNCAN: That problem does
18 not exist.

19 HONORABLE JANE BLAND: You're saying because
20 this uses the word --

21 HONORABLE SARAH DUNCAN: Because a notion
22 for JNOV doesn't extend the timetable.

23 HONORABLE JANE BLAND: Timely filed, but the
24 argument over what is a timely filed JNOV and you're just
25 saying the question is unanswered.

1 HONORABLE SARAH DUNCAN: No, the question is
2 perfectly answered. A JNOV filed more than 30 days after
3 judgment doesn't extend the appellate timetable. Right?

4 PROFESSOR DORSANEO: Right. Because it's a
5 motion to modify.

6 HONORABLE JANE BLAND: Okay. Right. But
7 that exists whether -- I mean, if we put this in then it
8 gets rid of some of the problem, which is whether it's 30
9 -- well --

10 HONORABLE SARAH DUNCAN: No. But what is a
11 timely filed motion for JNOV under current law?

12 HONORABLE JANE BLAND: Well --

13 HONORABLE SARAH DUNCAN: It's any motion for
14 JNOV filed within plenary power.

15 PROFESSOR DORSANEO: I don't think so. I
16 think it's only -- I think once we added the motion to
17 modify that any JNOV motion filed has to comply with the
18 motion to modify timetable, because they are the same when
19 they're after judgment, but a JNOV motion can be before
20 judgment and should be, and really it shouldn't be called
21 anything like JNOV after judgment because that's a motion
22 to modify, which has a timetable provided for. There is
23 -- or shouldn't be any external timetable for
24 post-judgment motions for JNOV added into the analysis
25 because it's covered. Okay?

1 HONORABLE SARAH DUNCAN: No, not okay.

2 PROFESSOR DORSANEO: The vehicles exist
3 before and after, and they're covered timetablewise. What
4 the people on the Court Rules Committee may or may not
5 have known is that a motion for a JNOV filed after
6 judgment is going to be governed by the motion to modify
7 rules, because our motion to modify rules don't say what a
8 motion to modify is for. They just say when you can use
9 it. But the cases say it now.

10 HONORABLE JANE BLAND: Well, I understand
11 that we're trying to fix a problem that may not even
12 exist, but I thought that everybody voted that we needed
13 to fix it, and so I was just trying to make a suggestion
14 to move it along the road, but I'm not sure the problem
15 exists either because I don't know if a court when faced
16 with these kind of interactive things would throw somebody
17 out of court.

18 PROFESSOR DORSANEO: Again, I think the
19 problem --

20 HONORABLE JANE BLAND: Particularly given
21 the fact that you can call it a bill of review and extend
22 the timetable, as long as the relief you're seeking is an
23 appropriate kind of relief for extending the appellate
24 timetable then it's probably going to get extended, but if
25 there's concern about that and everybody wants to address

1 it --

2 HONORABLE SARAH DUNCAN: Jane's just trying
3 to help.

4 HONORABLE JANE BLAND: I'm just trying to
5 help.

6 HONORABLE SARAH DUNCAN: Don't kill the
7 helper.

8 HONORABLE TOM GRAY: Sarah, maybe you can
9 help me on this issue as to on a motion to modify versus
10 something that's styled as a motion for judgment NOV. Is
11 there a ramification on the preservation of legal
12 sufficiency points in those two? I'm trying to remember
13 what the four things are that preserve legal insufficiency
14 points for appellate review.

15 HONORABLE JANE BLAND: Five.

16 HONORABLE TOM GRAY: Five. Does that
17 include a motion to modify the judgment?

18 HONORABLE JANE BLAND: Yes.

19 HONORABLE TOM GRAY: Okay. Then that
20 wouldn't be a distinguishing factor then.

21 CHAIRMAN BABCOCK: Yeah, Bill.

22 PROFESSOR DORSANEO: Would it help if I said
23 what things were actually dealt with?

24 CHAIRMAN BABCOCK: Yeah.

25 PROFESSOR DORSANEO: Well, it was a

1 reworking of Rules 296 through 331, you know, a large
2 chunk of the rule book. 296 through 299 changes involved
3 modifications of request for findings of fact and
4 conclusions of law rules. The rule on judgments involved
5 a -- which would have supplanted what are currently rules
6 300, 301, and some of the following rules. The most
7 significant change is to say that we have to have a
8 separate order that disposes of the entire case before we
9 have a final judgment, following a practice that's
10 followed in other places.

11 Currently now, although our procedure rule
12 says that we have "only one final judgment shall be
13 rendered in any cause except where it is otherwise
14 specially provided by law," we have Texas law that a
15 series of orders can be the final judgment without a --
16 without a paper finalizing things at the end; and the
17 committee thought that was a bad idea, that we ought to go
18 to a practice that has one final judgment that's
19 identifiable as a final judgment that looks like a final
20 judgment and not just say the last order finalizes the
21 whole case, you should have understood that and taken the
22 action appropriately.

23 CHAIRMAN BABCOCK: Just holding up for a
24 second on that, we have talked about that, that issue
25 recently or relatively recently, have we not?

1 PROFESSOR DORSANEO: I don't remember.

2 CHAIRMAN BABCOCK: Sarah didn't --

3 PROFESSOR ALBRIGHT: I remember that.

4 CHAIRMAN BABCOCK: -- you spend a lot of
5 time on that recently?

6 HONORABLE SARAH DUNCAN: We talk about that
7 issue every other month.

8 CHAIRMAN BABCOCK: Yeah.

9 PROFESSOR ALBRIGHT: We talked about that
10 issue when we were talking about Lehmann.

11 CHAIRMAN BABCOCK: Yeah.

12 PROFESSOR ALBRIGHT: Because I remember we
13 were talking about yellow sheets of paper and the clerk
14 says, "No, you can't make me go by the right colored
15 yellow paper."

16 CHAIRMAN BABCOCK: Well, Bonnie's not here,
17 so maybe we could slip that through. Okay. I'm sorry,
18 Bill.

19 PROFESSOR DORSANEO: Then we tried to deal
20 on a -- in one rule about all motions before and after
21 judgment and explain the standards for them. We did
22 change to Federal jargon, motions for judgment as a matter
23 of law, which is kind of standard jargon now and has been
24 for quite sometime. We provided the definition of what a
25 motion to modify is for and just wrote one sensible rule

1 that somebody could look at, arguably sensible rule, to
2 see about motion practice after verdict and after
3 judgment.

4 We did a rule for motions for new trial that
5 actually says the grounds for motion for new trial in a
6 list and that goes forward and talks about new trial
7 procedure in cases including affidavits or not. We added
8 a rule on preservation, which we don't have such a rule in
9 the civil procedure book now. It's in the appellate
10 rules. The reason why it's in the appellate rules is
11 because at least when the original appellate rules were
12 written the Court of Criminal Appeals did not have the
13 power to do rules for trial courts, so the preservation of
14 error or preservation of complaint rule was in the
15 appellate rules, and we don't have a similar rule, you
16 know, in the trial court rules, so this kind of matches
17 rule -- appellate Rule 33. And we have one larger rule
18 for timetables that combine what's in 329b and 306a, a
19 separate rule about the plenary power of the trial court,
20 and that about takes care of it.

21 So those are the subjects dealt with, but
22 they're dealt with, I think not -- not in such a
23 disjointed way as in our current rule book, and I think
24 the Court Rules Committee is right that on 301 it would be
25 better if it was broken down into subparts, I think

1 preferably with subheadings rather than just one long
2 thing that talks about the several different subjects.
3 Well, that's what the draft does, and maybe this is
4 nothing other than a starting point. I think it is a
5 starting point, but and some parts of it look pretty good,
6 you know, after ten years, more than ten years. Some
7 parts of it --

8 PROFESSOR ALBRIGHT: 15.

9 PROFESSOR DORSANEO: -- I think maybe could
10 be adjusted, and some parts certainly do need to be
11 changed because of Supreme Court case law.

12 CHAIRMAN BABCOCK: Right. Yeah.

13 PROFESSOR ALBRIGHT: I support doing
14 something like that. I know as long as I've been teaching
15 this I feel like I have to reteach myself all of these
16 deadlines and exceptions and exceptions to the exceptions
17 and then -- and it's hard for me even to find specific
18 provisions in the rules sometimes when asked specifically,
19 and I do this all the time, and so I think about somebody
20 appealing a case that it doesn't happen very often, and
21 it's ridiculous to have it that way. I think it really
22 needs some more -- I guess transparency is the word du
23 jour for things like this, but we need some cohesion and
24 transparency to these rules.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: Bill, are you saying -- I mean,
2 there still will be like a motion for judgment on the
3 verdict. Then if you make it before the judgment is
4 entered it could be an NOV, but anything made after the
5 judgment would be a modification or correction of the
6 judgment, right? So it would still be a NOV. It's just a
7 question of what you call it.

8 HONORABLE SARAH DUNCAN: Yeah. Yeah.

9 PROFESSOR DORSANEO: Yeah.

10 MR. LOW: Okay.

11 PROFESSOR DORSANEO: And we all agree that
12 it doesn't matter what you call it, because it's the
13 relief that's requested.

14 CHAIRMAN BABCOCK: Relief that's requested,
15 exactly.

16 MR. LOW: Like it says you can't file a
17 motion for judgment NOV after the judgment is entered. If
18 you do, it's overruled by operation of law, so the lawyer
19 needs to know, "Well, that's not what I need to call it,"
20 and in Federal court it doesn't matter what you call it.
21 They treat it as what it is, and I don't know that we do
22 that.

23 CHAIRMAN BABCOCK: Okay. Well, Bill, if
24 you're -- if you and Sarah are willing to take it on then
25 we'll put it on the agenda for the next meeting.

1 PROFESSOR DORSANEO: Well, do we get some
2 other people? Is it going to be Sarah's subcommittee?

3 CHAIRMAN BABCOCK: Your whole subcommittee,
4 yeah.

5 HONORABLE SARAH DUNCAN: I would suggest
6 that we combine the appellate committee that we're
7 cochairs of with the 301 committee that I'm chair of.

8 CHAIRMAN BABCOCK: Yeah. Sure.

9 HONORABLE SARAH DUNCAN: Because it's the
10 same.

11 PROFESSOR DORSANEO: Once upon a time I
12 thought I was going to be second chair of that committee,
13 but it never got written down.

14 CHAIRMAN BABCOCK: Cochair of that?

15 PROFESSOR DORSANEO: Not cochair. I don't
16 want to be a cochair.

17 CHAIRMAN BABCOCK: Vice-chair.

18 HONORABLE SARAH DUNCAN: No, I'm cochair,
19 and it doesn't make any difference. I'm cochair of the
20 appellate rules committee and it doesn't make any
21 difference. You can be chair of both of them for all I
22 care.

23 PROFESSOR DORSANEO: No, no. The chair has
24 to do more work.

25 MR. LOW: He wants to ride shotgun.

1 CHAIRMAN BABCOCK: Do you want to be the
2 vice-chair of that committee?

3 PROFESSOR DORSANEO: Vice-chair.

4 CHAIRMAN BABCOCK: Make that change. Who
5 is, Buddy is?

6 MS. SENNEFF: Ralph is.

7 PROFESSOR DORSANEO: Just put me on that
8 committee.

9 HONORABLE SARAH DUNCAN: And he's staying
10 that way. He's been a marvelous vice-chair.

11 PROFESSOR DORSANEO: Okay, thank you.

12 CHAIRMAN BABCOCK: Okay. And we're going to
13 put the uniform format manual -- we're going to advance
14 that two meetings because David Jackson is involved in
15 that one, so that takes us -- Bill, you're not off the
16 hook yet because item six on the agenda is classification
17 of appellate cases, civil or criminal. Anything to report
18 on that?

19 PROFESSOR DORSANEO: Well, this is a --
20 something that -- what I know about it comes from the
21 memorandum written by Jody Hughes on March 3rd, 2008,
22 which points out that sometimes it's hard to tell how to
23 categorize these cases, and there are differences of
24 opinions on how to do it. My basic difficulty here -- I
25 suspect I will not be the only one with a difficulty -- is

1 that I know little or nothing about -- very little, next
2 to nothing, about criminal appellate practice. I don't
3 even know what's appealable and what isn't.

4 CHAIRMAN BABCOCK: Or the timetable.

5 PROFESSOR DORSANEO: I know the timetable.
6 At some level, at some level, I understand what this is
7 about, but in certain other contexts I don't. I don't
8 really know the best way to proceed. You know, I could
9 tell you what I got out of the memo or Jody could tell
10 you, but I don't know how much good that would do
11 actually. In certain areas it's reasonably clear that it
12 probably ought to be regarded as a criminal case, a CR
13 case rather than a CV case. Probably the one who knows
14 the most about this is Tom Gray, or one of the persons who
15 knows quite a lot about it is Tom Gray, and I would defer
16 to him.

17 CHAIRMAN BABCOCK: And he looks like he's
18 not ready to be deferred to.

19 HONORABLE TOM GRAY: Actually, I was still
20 looking for Jody's memo, and was it on what we got? But
21 that's okay.

22 CHAIRMAN BABCOCK: It does not appear to be
23 in the materials, no.

24 HONORABLE TOM GRAY: Well, since it came out
25 of the -- I'm going to have to be careful in what I say

1 here since there is now a mandamus pending in the Court of
2 Criminal Appeals that at least touches on this. Believe
3 it or not it was not me that raised this issue in the
4 Council of Chiefs meetings, and what it dealt with is a
5 series of cases arising out of the effort of the
6 Legislature to improve the collection on court costs,
7 attorney's fees, and fines in criminal cases particularly,
8 and what happened from some source is a draft order was
9 provided to -- and this was -- let me back up.

10 This was a result, I believe, arising out of
11 the Legislature in 2005, that if collections were not
12 improved on these type categories there were going to be
13 certain consequences, and I don't remember what it was,
14 but some type funding was going to be limited, and I think
15 this is part of the funding that was going to be used for
16 the judicial pay raise that occurred about that same time,
17 and later those two bills got separated, the judicial pay
18 bill and the court cost collection, but from some source
19 an order arose that judges started entering, and according
20 to the briefing that is before the Court of Criminal
21 Appeals, some 14,000 orders were ultimately signed that
22 allowed the Department of Criminal Corrections to take
23 money from an inmate's trust account.

24 And they -- believe it or not, inmates
25 sitting around, had nothing to do, they started trying to

1 appeal those orders, and then they started hitting at the
2 courts of appeals, and the first question that -- and I
3 think we may have had the first one in Waco and then
4 shortly after we issued an opinion then the Sixth Court
5 issued an opinion, and they were -- one was treated as a
6 criminal case from our court and the other was treated as
7 a civil case from Texarkana, and it arose from that, but
8 it came up in a Council of Chiefs meeting because what
9 happens, depending on how you denominate it, is where does
10 it go then, and out of the Beaumont court, I believe it
11 was, a litigant -- it was determined one way or the other,
12 and they, I think, went to the CCA initially on a petition
13 or maybe it was the vice versa.

14 It may have gone to the Supreme Court, but
15 they said, "No, you've got to send to it the other one,"
16 and he almost missed his deadline to seek further review,
17 and that was the issue that arose at the Council of Chiefs
18 to try to get some direction that caused the letter to be
19 sent from Josh Morriss to Justice Hecht and then Justice
20 Hecht referred it to the committee.

21 And since my court is sort of in the middle
22 of the CCA issue, which this is part of it, I feel a
23 little bit limited about what I can say about it beyond
24 that, but the issue is not just in these particular type
25 proceedings and what it affects because the Court of

1 Criminal Appeals has different issues under which they
2 will grant mandamus relief as compared to the Supreme
3 Court, I guess you'd say, limits on mandamus relief. It
4 is very critical to know for us what kind of case it is,
5 because if it's a criminal case, mandamus relief is -- may
6 or may not be available. Our court -- a majority of the
7 Tenth Court -- how do you say it, Chip, Chair not voting?
8 Chief not voting.

9 CHAIRMAN BABCOCK: Right.

10 HONORABLE TOM GRAY: Anyway, a majority of
11 the Waco court has just blanket classified all of these as
12 criminal cases, therefore, mandamus relief is available in
13 this situation and, therefore, they have in effect vacated
14 all these orders.

15 CHAIRMAN BABCOCK: Okay.

16 PROFESSOR DORSANEO: The -- that's the first
17 thing covered in Jody's memo, deduction of court costs
18 from inmate trust accounts. And what test is being used
19 by the -- if you can recall, probably can -- by the
20 Texarkana court deciding whether something is civil in
21 nature rather than criminal in nature, and what test is
22 the Waco court using? If we need to figure out how to
23 classify these things it's hard for me to tell what is a
24 criminal case.

25 HONORABLE TOM GRAY: They did not in the --

1 it was the Abdullah case from Texarkana. They did not
2 even touch on the question of classification of civil
3 versus criminal. It wasn't on their radar screen so far
4 as I know. In the first case out of our court, which was
5 Crawford, it was, and the -- I don't remember exactly that
6 the buzzwords that are used. Jody may remember since he's
7 looked at that particular aspect of it more recently, but
8 "touching upon" or "arising out of," something like that,
9 a criminal case, and it was viewed that these were closely
10 connected to the underlying conviction.

11 I can tell you that by the way the Texarkana
12 court approached it, they didn't care what it related to,
13 they cared that the state had gone in and taken money from
14 an inmate trust account without any -- with what they
15 characterized as no notice or opportunity to be heard by
16 the prisoner, and so they -- and the word that I have
17 attempted to avoid using is "garnishment" because that has
18 a particular meaning in this context of these cases, but
19 garnishment is a particular type of civil action that may
20 or may not be involved in these cases.

21 CHAIRMAN BABCOCK: Justice Gaultney.

22 HONORABLE DAVID GAULTNEY: Justice Gray, in
23 these two cases were they original proceedings in both
24 courts? They were mandamus actions?

25 HONORABLE TOM GRAY: The -- I do not recall

1 how Abdullah was styled. I believe it was styled as an
2 original proceeding. The Crawford case originally came
3 through our court as on a notice of appeal, and so it was
4 filed, if you will, under his original conviction and case
5 number.

6 HONORABLE DAVID GAULTNEY: See, I think
7 there are two issues. I think there's a lack of
8 uniformity in how cases are designated, and that has -- in
9 addition to the desire to have uniformity in the state in
10 terms of how they're classified, it does indicate to the
11 litigant where they go next, because of our divided --
12 either if it's designated a CR, that's an indication to
13 that individual to go to the Court of Criminal Appeals and
14 CV to the Supreme Court, so it could make a difference in
15 terms of where they go, and it is a good indication.

16 I think part of the issue is traditionally
17 original proceedings have been considered civil matters or
18 a mandamus, even if it was somehow related to a criminal
19 case. The criminal case was thought of as prosecution by
20 the state, so it's what was filed by the state and what
21 was being prosecuted as a criminal case, and some courts
22 thought of original proceedings under Rule 52 more as
23 civil in nature, so you might have had a dichotomy. Not
24 all courts thought that way. Other courts looked at,
25 well, it's arising out of a criminal case, we'll give it a

1 CR, a criminal number. Well, in effect, that mandamus, if
2 there's another review, it's probably going to go to the
3 Court of Criminal Appeals, so there's some difficulty
4 there.

5 The rule is Rule 12.2, which says simply
6 that you are to designate it CV for a civil case or CR for
7 a criminal case, without definition of exactly what is a
8 criminal case and what is a civil case. So I think that's
9 where the lack of uniformity has arisen, is because
10 original proceedings, whether it arose out of a criminal
11 case or not, was sometimes treated as civil cases, civil
12 proceedings, and given CV numbers, even though it related
13 to or arose out of a criminal matter. So but my own view
14 is we ought to look toward achieving two goals, one,
15 uniformity, and the other, a good indication to the
16 litigant where they go next. So it ought to be some
17 indication of where you're going to go. If you're going
18 to go to the Court of Criminal Appeals as your next
19 appellate route or review route then it ought to have a CR
20 and to the Texas Supreme Court, a CV.

21 The case he mentioned out of Beaumont, I
22 know it's a little bit different. We've currently changed
23 our designation, but, for example, an insanity acquitting,
24 that's a civil matter when they come up for review. I
25 think in that case at one point we were giving them CR

1 designations. Well, in fact, his appeal is to the Texas
2 Supreme Court, not to the Court of Criminal Appeals. We
3 are currently designating them CV, but that's the type of
4 issue that we're looking -- that you're looking at. I
5 think its principal application -- and this is the reason
6 I asked Chief Justice Gray the question is I think its
7 principal application or concern is in original
8 proceedings.

9 HONORABLE TOM GRAY: Other proceedings in
10 which this has been extensively discussed in the case law
11 is juvenile cases because they are -- obviously they are
12 criminal prosecutions, but they are of juveniles, and it's
13 covered by the --

14 PROFESSOR DORSANEO: Family Code.

15 HONORABLE TOM GRAY: -- Family Code, and
16 therefore, they go to the Supreme Court.

17 PROFESSOR DORSANEO: That makes absolutely
18 no sense to me that the juvenile cases are civil cases.
19 It just doesn't.

20 HONORABLE DAVID GAULTNEY: But by
21 designating it CV you are telling the litigant where
22 they're going.

23 PROFESSOR DORSANEO: Well, yes.

24 HONORABLE DAVID GAULTNEY: So I don't view
25 those as problem cases because they're not misleading the

1 litigant on where their next step is. I think it's where
2 you get a situation where your CV designation is really
3 going to go to the CR, and that's where you've got a
4 misleading signal.

5 PROFESSOR HOFFMAN: Petition to expunge a
6 criminal record, that's a civil proceeding.

7 PROFESSOR DORSANEO: That's civil.

8 CHAIRMAN BABCOCK: Yeah, Richard.

9 MR. MUNZINGER: Would the Texas Supreme
10 Court have the authority to designate something CR,
11 thereby conferring jurisdiction on the Texas Court of
12 Criminal Appeals without the Texas Court of Criminal
13 Appeals' consent or agreement, and even assuming the Texas
14 Court of Criminal Appeals gave its consent or agreement,
15 does the Texas Supreme Court have the power to create
16 jurisdiction in either of the two courts by a designation
17 of those two letters?

18 HONORABLE NATHAN HECHT: Well, the answer,
19 which is not entirely responsive, is that if the Supreme
20 Court gets a filing that it believes should have been
21 directed to the Court of Criminal Appeals, we send it to
22 the Court of Criminal Appeals. It's not dismissed, it's
23 just transferred administratively to the Court of Criminal
24 Appeals, and it's as if it had been filed there.

25 MR. MUNZINGER: But a classification system

1 that let, I'm assuming, clerks of the courts of appeals
2 designate whether a case is criminal or civil is going to
3 have jurisdictional effects on the proceeding before the
4 Court of Criminal Appeals, which will go to one or the
5 other court, raising the legal question that I had in my
6 mind, can you do that under our state constitution?

7 HONORABLE NATHAN HECHT: Well, we're not --
8 when we transfer it to the Court of Criminal Appeals we're
9 not saying "You have jurisdiction." We're only saying,
10 "We don't think we have jurisdiction, but since you might
11 and you should decide that for yourself, we're sending it
12 over to you," but they don't ever send us stuff as far as
13 I know and --

14 CHAIRMAN BABCOCK: What if they say, "We
15 don't think we have it, but you do"?

16 HONORABLE NATHAN HECHT: Well, I think I
17 know what they do with the stuff that we send them, but
18 anyway, that's the way it's worked. I mean, we only make
19 the determination for ourselves, and we let them make
20 their own determination, but if we think they don't have
21 it and -- we don't have it and they might, we send it to
22 them.

23 PROFESSOR DORSANEO: Do we take the same
24 approach for bail bond forfeiture cases? Would it be
25 better to try to make a list of cases that should be

1 identified in the appellate rules or would it be better to
2 come up with some sort of a definition of a criminal case?
3 Is it possible to come up with a definition of a criminal
4 case that will work, that will be workable and usable by
5 courts, or does it have to be a one-by-one list of at
6 least the more important problem areas? Bail bond
7 forfeitures I understand are split in a similar way to
8 this inmate trust fund stuff.

9 HONORABLE TOM GRAY: They are. And the
10 reason that I would try to avoid the list is because you
11 would have never thought to list the one that is now the
12 biggest problem, and that's these trust fund cases, and I
13 think it's even a mistake to try to characterize those
14 trust fund cases all of one type because there are various
15 scenarios that come up in the amount of money that is
16 garnished and what that might -- how that might affect it,
17 because there may have been an order entered at one time
18 that there was \$200 worth of court costs and then they get
19 later added in their trial counsel fees and fine and then
20 later they get added in the appellate cost, and is that a
21 modification of the judgment first or is that just all
22 under the cost scenario and part of the process? Are you
23 actually amending the -- or modifying the trial court
24 judgment, say by nunc pro tunc, or are you actually
25 garnishing the trust fund for the amount of all those fees

1 and costs?

2 And so what I'm saying is I think you've got
3 to describe it or define it in some fashion and without --
4 I mean, I don't want to dominate this conversation, but
5 the problem for me -- and I apologize, again, for
6 referring to it, but the CCA has sort of got part of this
7 issue in front of them, and I'd defer to the Supreme Court
8 as to whether or not this is a good time to really take up
9 this particular topic.

10 PROFESSOR DORSANEO: Mr. Chairman, I think
11 this is a -- this may be an appellate rules subcommittee
12 problem, but it really seems to be a distinct issue that
13 only the courts of appeals justices really know what this
14 is about, so I don't know whether we want to have a
15 special committee on this or just deal with it in the
16 appellate rules committee.

17 CHAIRMAN BABCOCK: Well, let -- yeah,
18 Justice.

19 HONORABLE TRACY CHRISTOPHER: Even if we
20 made a list and put it in the Rules of Appellate
21 Procedure, I mean, does the Texas Supreme Court have the
22 right to just change those that would change how it goes
23 to the Court of Criminal Appeals? I mean, even if we by
24 rule put it in the list, would the Court of Criminal
25 Appeals agree that, yeah, now that it's in this rule book

1 it goes to the Supreme Court?

2 CHAIRMAN BABCOCK: Well, that would be one
3 of the questions, I would think. Judge Patterson.

4 HONORABLE JAN PATTERSON: Well, can't chiefs
5 come up with some kind of categories?

6 HONORABLE TOM GRAY: We can come up with all
7 kinds of categories, but --

8 HONORABLE JAN PATTERSON: Well, it would
9 seem to me that it's a practice of the courts problem
10 whether habeas cases are considered civil or criminal and
11 the clerks designate them as such. I'm just baffled why
12 it's a -- why they just can't work it out.

13 CHAIRMAN BABCOCK: Buddy had his hand up and
14 then Justice Gaultney.

15 MR. LOW: I was going to ask, what happens,
16 say, for instance, say, they file on the last day to the
17 Supreme Court and then they take it to the Court of
18 Criminal Appeals or vice versa, the other. Couldn't
19 the -- and the Courts can't decide. Couldn't the two
20 chief justices decide and say that "filed improperly with
21 one would be deemed timely," and if there's a disagreement
22 that two chief judges could get together and would kind of
23 work its way out. People would see that's no longer
24 criminal, it's civil, but people wouldn't suffer in the
25 meanwhile. I don't know. Just a suggestion because --

1 CHAIRMAN BABCOCK: Well, I think -- I think
2 what's clear is that this problem ought to be referred to
3 the evidence --

4 MR. LOW: Right.

5 CHAIRMAN BABCOCK: -- subcommittee, so --

6 MR. LOW: Oh, no, wait. I'm sorry.

7 CHAIRMAN BABCOCK: You've got to wait until
8 the question is asked.

9 MR. LOW: But I wasn't even on that
10 committee in 1883.

11 CHAIRMAN BABCOCK: I think this probably
12 does call for a study by a different -- slightly different
13 type of people than the appellate subcommittee, so we'll
14 work on that.

15 Buddy, you're the last item on the agenda.
16 How long -- I know you always say short, but my question
17 is should we take a short break now?

18 MR. LOW: I've got better news. Lonny is my
19 spokesman, so you won't have to listen to me. What do you
20 think, Lonny? You want to take a break first?

21 PROFESSOR HOFFMAN: I think it will take us
22 15 minutes.

23 CHAIRMAN BABCOCK: So you want to take a
24 little short break, like maybe five, ten minutes?

25 HONORABLE TRACY CHRISTOPHER: No, go.

1 HONORABLE HARVEY BROWN: Press on.

2 CHAIRMAN BABCOCK: Press on? Everybody want
3 to press on?

4 MR. GARCIA: What's our estimated completion
5 time? We've got 5:00 o'clock flights.

6 CHAIRMAN BABCOCK: Yeah, this is the last
7 agenda item. All right. Is that okay with everybody? Is
8 that okay with you guys? Okay. Press on.

9 PROFESSOR HOFFMAN: So we've been asked to
10 consider an alternative -- we've been asked to consider an
11 amendment to TRE 902. The issue has to do with that there
12 doesn't seem, according to proponents of the change, to be
13 any language in any rule that makes clear how you
14 authenticate an arbitration award that you want the judge
15 to -- that you want a district judge to confirm.

16 So in looking at this, I've got a memo that
17 I gave to Buddy and the rest of the subcommittee on March
18 17th. Some of you have that. Basically this is kind of
19 quickly what I did when Buddy asked to take a look at it.
20 I talked to several different people, and the input I got
21 from people who have a lot of experience in this area is
22 that this is never, ever, ever a problem. You know, so
23 collectively of 120 years worth of experience and there
24 isn't a single war story.

25 Now, that said, Jody e-mails me yesterday

1 and *Gruber vs. Gruber*, a case decided on April 2nd here,
2 in which judge -- Justice Carolyn Wright found that she
3 couldn't take judicial notice, and because they didn't try
4 any other means like a business records exception, they
5 hadn't properly authenticated the arbitration award. This
6 is the only such decision that takes that position, and as
7 I said, there are five people who have been talked to with
8 lots and lots of experience who say this doesn't ever come
9 up.

10 So let me now transition. Why does it
11 perhaps never come up? So it looks like the current law
12 provides kind of as follows, and I set this out, that
13 basically the Texas General Arbitration Act says, 171 and
14 053, that an arbitrator has to -- the award of the
15 arbitrator has to be in writing and signed, more, but
16 that's kind of dictating. It then says in 081 that a
17 court has jurisdiction to, among other things, enforce and
18 render judgment. And how do you go about getting a court
19 to enforce and enter judgment? You go through the
20 confirmation procedure that's streamlined. That's 082.
21 That's the application for an award.

22 So that's what you do, and it doesn't say
23 anything about -- it's very short. You can look at it
24 there. It just says you file an application with the
25 court for an order and that invokes the jurisdiction of

1 the court, and then the sort of payoff out of all of this
2 is 087, which says "Unless grounds are offered for
3 vacating, modifying, or correcting an award the judge
4 should confirm it." So it's a streamlined process, and
5 that's the idea.

6 So my reading on that would seem -- which,
7 again, I'm the novice here, but seems to be consistent
8 with what the folks I talked to said, is that these
9 provisions give explicit or at least implicitly provide
10 that an award is authenticated for these purposes when it
11 complies with 053, that is it's in writing and signed by
12 the arbitrator and then is submitted as part of this
13 streamlined process that's that 082 process when you're
14 applying for an enforcement order. Okay. Everybody with
15 me? So it's meant to be streamlined. It's not -- you
16 know, so it -- so it doesn't say whether that means it's
17 like the court's taking judicial notice. It doesn't say
18 whether it's a kind of a self-authentication like the
19 things that are self-authenticated specifically, but it
20 appears to sort of have that effect, and that's about it.

21 So anyway, so the end -- and the long and
22 short of that is my conclusion seems to be, based on my
23 reading of the language in the TGAA, is that it is
24 consistent with what the experts say, which is there is no
25 problem. This is just kind of how it's done, and people

1 don't bring this up. When they've got a problem, whether
2 it be a problem with authentication or, you know, "Hey,
3 that's not really what he said. He didn't award five
4 hundred million dollars against me. He only ordered \$500
5 against me, they forged it." Okay. So they would raise
6 that substantive and/or call it an authentication issue in
7 the course of challenging, you know, correcting,
8 modifying, or, you know, don't enter the order. So
9 there's a process, and so we don't need some separate
10 thing.

11 Now, that said, it also is true that there's
12 nothing sort of explicitly there, and once in a while,
13 apparently only once in a while, you get a case like this
14 Gruber case. So that then it seemed to me to raise one
15 other question that I kind of throw out. Maybe I'll stop
16 after this and then kind of open it up, although I could
17 say more, I think this is sufficient to frame the issue.

18 I have some concern that I think is
19 well-founded that we ought not to make a change given that
20 we really don't have any war stories here and even the
21 proponents don't even cite -- you know, Gruber wasn't even
22 out, so they didn't have this case to cite. They have no
23 examples to cite, and it seems to me to be strange, odd,
24 and potentially dangerous that we would make a change that
25 could be sent as a signal to people that we want to add --

1 you know, so the concern I've got is that it would add a
2 presumption of sort of authenticity and maybe even
3 substantive validity perhaps that I think would not be
4 intended. It would just be meant to correct what we might
5 perceive to be a loophole in the law, a loophole that
6 nobody else has seemed to see, and the act of doing that
7 would send the wrong message. So, anyway, the conclusion
8 of my memo is it seems neither necessary nor appropriate
9 to make any change, kind of given what we've got so far.

10 MR. LOW: And, Chip, one of the complaints
11 was they say, well, through a request for admissions and
12 they'll deny it, that opens it up, if you can't -- so I
13 totally endorse don't do anything with it. The person, I
14 don't think, have a legitimate complaint.

15 CHAIRMAN BABCOCK: I'm sorry. You
16 endorse --

17 MR. LOW: No, exactly what Lonny said.

18 PROFESSOR HOFFMAN: That was "amen."

19 CHAIRMAN BABCOCK: Okay. All right. I got
20 it. Any other comments? Yeah, Judge.

21 HONORABLE TOM LAWRENCE: It's not just
22 district court. JPs and county courts, I get a lot of
23 these things, and I've never had any problem. They always
24 just file a copy of the arbitration order, and I am
25 astonished there's ever a problem with it. I don't think

1 there's any need to change anything either.

2 CHAIRMAN BABCOCK: Okay. Yeah, Judge.

3 HONORABLE TRACY CHRISTOPHER: Well, I think
4 the vast majority of them are defaults, and occasionally
5 we'll get someone who, you know, basically files a general
6 denial type answer to the lawsuit and then the question is
7 you file a motion to confirm the arbitration award and you
8 just attach a copy of it, and that's it, and that's all
9 that has to be done? Because usually the people that are
10 suing are, you know, like a big credit card company, so
11 they don't have anybody to authenticate it in any
12 meaningful way in terms of, you know, filing the motion to
13 confirm the arbitration award. So it happens rarely that
14 you're kind of left to yourself, well, what do they have
15 to do to prove this -- that this paper was really the
16 arbitration award.

17 PROFESSOR HOFFMAN: Tracy, just to follow up
18 on that so I can -- see if I can understand your comment,
19 so I think what you're saying is you would be opposed to
20 the proposed change because the proposed change would make
21 it perhaps easier -- I think it would make it easier in
22 that rare case you're talking about when there's some
23 uncertainty because they would --

24 HONORABLE TRACY CHRISTOPHER: Well, I think
25 that's the intent of the rule change, because as you can

1 CHAIRMAN BABCOCK: Tom.

2 MR. RINEY: Well, if it occurred very
3 rarely, why couldn't they just send a deposition on
4 written questions to the arbitrator and, without really
5 much expense, prove it up? Why go create these other
6 problems?

7 CHAIRMAN BABCOCK: Carlos had his hand up
8 next, I think.

9 MR. LOPEZ: Policy decisions are the tough
10 ones as opposed to a grammatical fix or whatever because
11 it's obviously a policy deliberative issue, and I'm not
12 sure that I'm more cognizant of the issue than anybody
13 else, but looking at it from the 10,000-foot standpoint,
14 I'm always a little reticent when one particular group,
15 you know, wants -- I mean, this is a substantive change to
16 902. I mean, this is not just an interpretation. This
17 is -- they want to make it if it purports to be an
18 arbitrator's signature then it's self-authenticating,
19 well, where is the extrinsic evidence that's really what
20 it says.

21 I mean, we always -- in other cases we've
22 always made them prove that it is what it really says, and
23 before you take judicial notice of something there has to
24 be some proof that what they're asking you to -- if they
25 want you to take judicial notice that it's 86 degrees

1 outside, they've got to prove it's 86 degrees outside.
2 So, I mean, I'm a little hesitant to say, you know, let's
3 start down the path of making these specific exceptions to
4 what is an otherwise a pretty good rule just because in
5 this particular case this particular group thinks it's too
6 much of a pain to do X, Y, or Z. I think it's a dangerous
7 road we're headed down if we start.

8 MR. LOW: And there's one Fifth Circuit case
9 that holds that 902 takes care of it as a business record.
10 We define business in 902 a little different from them, so
11 if they have concerns -- and this opinion, Jody says here,
12 it says it wasn't offered as a business record, so, you
13 know, you can't take judicial notice, but if you have a
14 problem then follow 902 as a business record. But
15 otherwise, that wasn't really the intent of the statute,
16 and the whole thing, it is as Lonny said, but this is a
17 fall back if you want to say, "Well, I can't do it, Fifth
18 Circuit has held that it was error not to, you know, allow
19 it as a business record."

20 CHAIRMAN BABCOCK: Yeah. Somebody had their
21 hand up. Judge Christopher or was it --

22 HONORABLE TRACY CHRISTOPHER: No.

23 CHAIRMAN BABCOCK: Judge Lawrence.

24 HONORABLE TOM LAWRENCE: Well, has anyone
25 ever come in and said -- and tried to purport that a false

1 or forged arbitration award is being offered to try to --
2 if that's not happened then that would be the most
3 dangerous thing, and also, if we were going to create some
4 other rule to require something else, wouldn't that
5 necessarily involve having the arbitrator do something,
6 fill out some form or have some other kind of document to
7 go with it, and we wouldn't have any control over that, so
8 I don't know how we could do that.

9 MR. LOW: I move that we --

10 HONORABLE NATHAN HECHT: Let me --

11 CHAIRMAN BABCOCK: Hang on before you move.

12 HONORABLE NATHAN HECHT: One other point,
13 picking up on Judge Lawrence's point, which is in the
14 changing -- in eliminating Rule 8.1(e) of the appellate
15 rules requiring an authenticated copy of bankruptcy papers
16 as before the case is abated for bankruptcy, part of the
17 thinking behind that is it's harder and harder to get
18 these authenticated and certified copies because so many
19 of them are kept electronically --

20 MR. LOW: Right.

21 HONORABLE NATHAN HECHT: -- these days, and
22 we seem to be sort of moving away from this formal proving
23 up of papers.

24 CHAIRMAN BABCOCK: Buddy had a motion he was
25 about to make.

1 MR. LOW: I make a motion for no change.

2 CHAIRMAN BABCOCK: Huh?

3 MR. LOW: No change. No --

4 CHAIRMAN BABCOCK: You move no change?

5 MR. DUGGINS: Second.

6 CHAIRMAN BABCOCK: Justice Gray. Second.

7 By the vice-chair?

8 MR. DUGGINS: I'm not the vice-chair.

9 CHAIRMAN BABCOCK: No, not the vice-chair of
10 that committee.

11 MR. LOW: But he's taught me. I've heard
12 very little complaints. Next time I have something to
13 present, Lonny, will you present it for me?

14 CHAIRMAN BABCOCK: Any dissent from that?
15 Justice Gray.

16 HONORABLE TOM GRAY: Tom was talking about
17 that you could do these by interrogatories, and the letter
18 I do -- would point out describing the problems that it's
19 something that should be able to be done by request for
20 admission, but then they come back denied, and so
21 apparently there's something out there, but without more
22 information about what the problem is, I third the motion.

23 CHAIRMAN BABCOCK: Okay. So I think we're
24 good on that. Hang on, everybody, for just one second.
25 The group that the Court would like to form a new

1 subcommittee or a subcommittee to deal with this
2 classification of appellate cases is proposed as follows:
3 Justice Gaultney as chair; Roland Garcia as vice-chair;
4 Justice Jennings, who is not here; Justice Patterson;
5 Judge Yelenosky, who is not here; and Pete Schenkkan, who
6 is not here. So everybody in favor of that raise your
7 hand.

8 MR. KELLY: Always nominate the absentees.

9 CHAIRMAN BABCOCK: That's our new
10 subcommittee. We've had a couple of members of the public
11 present all day. I know one is Ms. Youngblood, and we're
12 happy to have you here, and any member of the public is
13 always welcome to watch if they can stand to sit through
14 all this.

15 MS. YOUNGBLOOD: I enjoyed it immensely.
16 Thank you for having me.

17 CHAIRMAN BABCOCK: And any other business
18 that anybody has? What's our next meeting?

19 MS. SENNEFF: June 13th.

20 CHAIRMAN BABCOCK: June 13th.

21 MS. SENNEFF: And all the meetings this year
22 are here.

23 MR. LOW: That's on a Friday?

24 MR. DUGGINS: The 13th.

25 CHAIRMAN BABCOCK: Yeah, Friday, the 13th,

1 so all the rules we recommend that day will be blessed.

2 Thanks a lot for coming and working so hard. Thank you.

3 (Meeting adjourned at 3:43 p.m.)

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2 **REPORTER'S CERTIFICATION**

3 **MEETING OF THE**

4 **SUPREME COURT ADVISORY COMMITTEE**

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8 I, D'LOIS L. JONES, Certified Shorthand

9 Reporter, State of Texas, hereby certify that I reported

10 the above meeting of the Supreme Court Advisory Committee

11 on the 4th day of April, 2008, Friday Session, and the

12 same was thereafter reduced to computer transcription by

13 me.

14 I further certify that the costs for my

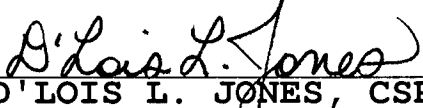
15 services in the matter are \$ 1,728.75 .

16 Charged to: The Supreme Court of Texas.

17 Given under my hand and seal of office on

18 this the 21st day of April, 2008.

19

20 

21 **D'LOIS L. JONES, CSR**

22 Certification No. 4546

23 Certificate Expires 12/31/2008

24 3215 F.M. 1339

25 Kingsbury, Texas 78638

(512) 751-2618

#DJ-210