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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

September 5, 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 5th  
day of September, 2008, between the hours of 9:03 a.m. and  
3:55 p.m., at the Texas Association of Broadcasters, 502  
E. 11th Street, Suite 200, Austin, Texas 78701.

**INDEX OF VOTES**

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

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**Documents referenced in this session**

08-7 SCAC 1996 amendments to TRCP 296-331

08-8 Uniform Format Manual for TX Court Reporters  
proposed Section 16.16

08-9 e-mails regarding TRAP 13.1

08-10 Categorization of appellate cases, memo from Justice  
Gaultney dated 6-7-08

08-11 Categorization of appellate cases, memo from Jody Hughes  
dated 3-3-08

08-12 PJC August draft, blackline

08-13 PJC August draft, clean

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CHAIRMAN BABCOCK: Justice Hecht has been called away to a CLE program, and so he will give us his status report later, but in his absence I want to introduce to the committee Kennon Peterson, who is the new rules attorney, is sitting to my left. She was with the Chief for some period of time and then went into private practice and realized, as many of us do, that it's not everything it's cracked up to be, and so now she's back with the Court and the rules committee, so welcome to this little exercise.

MS. PETERSON: Thank you.

CHAIRMAN BABCOCK: I told her when I saw her that I was welcoming her to our little committee, and she said, "It doesn't look so little to me," so there we go. We will not be meeting tomorrow. I'm certain we'll get through this agenda today and maybe quite quickly today. If we hurry we can do it all before Justice Hecht gets back at 10:15.

The first thing on the docket, and I'm not sure how much we're going to be able to talk about this in the absence of Sarah, but it's the letter that we got from Justice Hecht about a year ago regarding Rule of Civil Procedure 301 and TRAP Rule 26.1(a), and I think Professor

1 Dorsaneo may be passing out some proposed amendments that  
2 the Supreme Court Advisory Committee did about 12 years  
3 ago.

4 PROFESSOR DORSANEO: No, I'm passing out  
5 what you just mentioned, the Hecht letter.

6 CHAIRMAN BABCOCK: Okay, the Hecht letter.  
7 That should have been on the website, wasn't it?

8 MS. SENNEFF: Yeah. It has been.

9 CHAIRMAN BABCOCK: The September 25th, 2007,  
10 letter. As both Ralph Duggins and Professor Dorsaneo  
11 pointed out to me, the Supreme Court -- and at the last  
12 session, the Supreme Court Advisory Committee did consider  
13 some of these rules in July of 1996 and proposed some  
14 changes to the Court, and the Court did not act on those,  
15 so we're coming around 12 years later to do it. So with  
16 that preface, Ralph or Professor Dorsaneo, who wants to  
17 talk?

18 MR. DUGGINS: Well, I'll start by saying  
19 that what Bill just handed out is the State Bar Rules  
20 Committee proposal that Justice Hecht asked this committee  
21 to consider.

22 MR. GILSTRAP: We didn't get what you're  
23 passing out over here.

24 MR. DUGGINS: I'm sorry. Well, I made 40  
25 copies, so there should be plenty.

1 CHAIRMAN BABCOCK: I think it was on the  
2 website, too.

3 MR. GILSTRAP: I'm sorry. I'm sorry.

4 MR. DUGGINS: The Bar committee, Bar Rules  
5 Committee, proposed to amend 301 to provide a  
6 post-judgment deadline for filing a motion for JNOV or to  
7 disregard a jury finding and a corresponding proposal to  
8 TRAP Rule 26.1(a). This was discussed at the April  
9 meeting, and as Bill and Sarah pointed out, in 1996 this  
10 committee did submit proposed amendments to Rule 296  
11 through 331. A wholesale and I think significant  
12 consideration was given to all of those rules with a great  
13 deal of discussion and work, and I don't know why the  
14 Court did or did not act in any capacity on it, but it  
15 doesn't appear that any of the proposals were adopted.

16 So the issues that the committee, I think,  
17 faces are two. One is confusion over when motions for  
18 JNOV or to disregard findings may be filed or must be  
19 filed because the current rule doesn't specify any time  
20 period.

21 And the second issue is whether the filing  
22 of either motion should extend any appellate deadlines.  
23 The consensus of the discussion last time was that the --  
24 this proposal that you have is not a complete fix,  
25 although there were several favorable comments that it is

1 better than the existing rule because it does provide some  
2 time line -- timetables. We took one vote, which was 19  
3 to 1 in favor of revisiting all the related rules.  
4 Unfortunately, the committee has not had an opportunity to  
5 complete that, but I do think it would be very helpful to  
6 us to have some discussion about some thought -- I mean,  
7 some guidance from this committee about what you think --  
8 what direction we should go on a motion for JNOV, because  
9 as, for example, Nina pointed out, historically this  
10 motion was filed before a judgment had been signed.

11           So, for example, do you want to have the  
12 ability to file this motion after a judgment has been  
13 entered? Do you want to permit it or do you want to  
14 require it to be filed before? I'm not suggesting that,  
15 but -- and then another issue that I'd throw out that  
16 Justice Hecht raised is do we want to have two timetables  
17 on the effect of the filing of some of these motions,  
18 because we presently have two, and I think that the  
19 consensus last time was that we had a -- that while the  
20 appellate practitioners may have this all down, people who  
21 don't do it on a regular basis find this set of rules very  
22 confusing, and so there definitely is a desire, I think,  
23 to address and simplify.

24           I would turn it over to Bill for some  
25 comments at this point, but I'd love to see some

1 discussion on just what you think a cleanup ought to have,  
2 and then by the next meeting we'll present some proposed  
3 language to at least these two rules, if not a couple of  
4 others.

5           PROFESSOR DORSANEO: Well, the specific  
6 proposal from the court rules committee, I don't know  
7 whether last time whether we actually considered what the  
8 change was from the current rule, the specific wording  
9 change. I don't remember in that record.

10           MR. DUGGINS: Well, the change, if you look  
11 at page two, the rules committee breaks it down into three  
12 paragraphs. Paragraphs (1) and (3) are identical to the  
13 current rule. It's just the current rule the rules  
14 committee deletes the middle sentences that say -- that  
15 begin "provided upon motion" and propose instead to insert  
16 new paragraph (2).

17           PROFESSOR DORSANEO: Yeah, and then as I see  
18 it, too, the thing that -- things that are different begin  
19 with the third sentence. "Such motions and any amended  
20 motions shall be filed not later than the time for filing  
21 a motion for new trial under 329b" and, you know, that's  
22 adding something to Rule 301 that isn't there now. There  
23 is no timing, as Ralph indicated. I think -- and I think  
24 it's pretty plain that you could obtain the same kind of  
25 relief in the trial court by filing a post-judgment motion

1 to modify, such that, you know, there's a way to do this  
2 kind of motion after judgment right now in accordance with  
3 329b's timetable. It just wouldn't be a 301 motion. It  
4 would be a 329b motion to modify, but nonetheless, it's a  
5 good idea for the timetable to be made plain for 301  
6 motions, because that has been troublesome for some time.

7           The next two sentences are of more  
8 significance to me. "Any timely filed motion shall extend  
9 the trial court's plenary power." The next two sentences  
10 generally treat a 301 motion the same way that a motion  
11 for new trial is treated and a motion to modify is  
12 treated. The two things that these two sentences provide  
13 are, you know, one, extension of plenary power in  
14 accordance with 329b for a timely filed motion or amended  
15 motion under 301; and then, two, overruling the 301 motion  
16 by operation of law rather than by signed written order,  
17 which is required, you know, now.

18           All of those things -- those two things I  
19 think are significant, and what we did in 1995 and 1996  
20 did not handle the problem the way the court rules  
21 committee is suggesting that it be handled, so it would be  
22 useful guidance for Ralph's committee to know what you  
23 think about these suggestions, these distinct suggestions  
24 from the court rules committee.

25           Now, from the standpoint of the appellate



1 rules committee, and I'm embarrassed that I didn't ask the  
2 committee to actually, you know, consider and vote on  
3 this, but from the appellate perspective, look at page  
4 three. Now, we have, I think as Ralph was saying, two  
5 appellate tracks, the 30-day track and a 90-day track, and  
6 you get on the 90-day track by filing certain things in  
7 the trial court in a timely manner, and one of the things  
8 that's not in the list is a 301 motion. Okay. And that,  
9 that could screw somebody up if they thought that -- if  
10 they thought that they were on the longer track because  
11 they had filed a motion under Rule 301.

12           Again, motions to modify are here, so if  
13 somebody filed a post-judgment 301 motion I would hope  
14 that a court would treat that as a motion to modify and  
15 give the longer track, but spelling it out doesn't hurt  
16 any. There still would be one motion that's made after  
17 verdict. It's not on this list, just a motion for  
18 judgment, and if -- you know, I teach my students that  
19 they need to know that only some post-verdict motions get  
20 you the longer track and some don't, and that's a little  
21 lesson you need to learn. Maybe it would be better if  
22 they didn't need to learn that. Okay. If both of those  
23 motions were added to 26.1. And what was Justice Hecht  
24 saying about going to the -- going to one track?

25           MR. DUGGINS: He just asked the committee to

1 consider whether we should eliminate two tracks and go to  
2 a one track where we just have a specified date that  
3 triggers the duty to file a notice of appeal.

4           PROFESSOR DORSANEO: Well, I've been in  
5 favor of that forever. This two track thing is kind of an  
6 accidental development over time, it seemed to me, and  
7 this just makes things more complicated than they need to  
8 be, and I don't know if any -- the cases on the 30-day  
9 track move any faster through the system than if they're  
10 on the 90-day track. Maybe the appellate justices here  
11 can make that clear to us.

12           And again, I didn't ask our subcommittee  
13 what they think about making this change or this change  
14 plus adding motions for judgment, but that's, you know, a  
15 companion to 301 issues, but it's really distinct from the  
16 301 issues. You could accept what the court rules  
17 committee suggests with respect to 26.1 and not change 301  
18 at all, and it would be fine.

19           CHAIRMAN BABCOCK: Bill, do you know, or  
20 maybe Carl knows, what was the impetus for the State Bar  
21 Rules Committee getting into this to begin with?

22           MR. HAMILTON: I'm not on that committee  
23 anymore, so I don't know.

24           CHAIRMAN BABCOCK: Yeah, okay. Anybody  
25 know? We do have a member who is --

1 MS. SENNEFF: Hayes Fuller.

2 CHAIRMAN BABCOCK: Yeah, Hayes Fuller, who  
3 is not here. So nobody knows why the State Bar was  
4 interested in this?

5 PROFESSOR DORSANEO: Not on the basis of any  
6 evidence, but this has been a little wrinkle of Texas  
7 procedure for sometime. What I don't know about either is  
8 is it difficult to get a hearing on a 301 motion? Because  
9 you need to have a hearing and a ruling. The first case  
10 that I worked on I made that mistake in *Wright vs. Reed* in  
11 the Sixties. We discovered if you filed a 301 motion it  
12 doesn't get overruled by operation of law. You need to  
13 set it for a hearing and get it overruled by the judge in  
14 order to preserve your complaint.

15 Now, that may be regarded as difficult to  
16 do. It may be difficult to get a hearing on the motion.  
17 Maybe it's just a waste of time to get the hearing on the  
18 motion, such that it would be good if things were  
19 overruled by operation of law, the way motions for new  
20 trial and motions to modify are. I think probably the  
21 court rules committee is trying to clear things up and  
22 also trying to make the procedures more simplified and  
23 less likely to trip somebody up.

24 MR. DUGGINS: Chip, you've also got -- on  
25 the first page of the handout you'll see a summary of the

1 issues. There are two cases that are mentioned, and the  
2 second one, the Kirschberg case, noted that under the  
3 Supreme Court ruling in Gomez the San Antonio court  
4 believed that a JNOV motion extended the appellate  
5 timetable. It's just a -- I think there's a desire to  
6 clean up -- clean those issues up about whether it does  
7 extend the timetable and what you have to do to do so.

8 CHAIRMAN BABCOCK: Yeah. Okay. Yeah.

9 MR. GILSTRAP: Obviously this has been a  
10 potential trap that's been there for years, and it's not  
11 overruled by operation of law and it doesn't extend the  
12 appellate timetable, and, you know, everybody who's seen  
13 it says, "Golly, that's a trap. I can use it someday,"  
14 but I don't know anybody that's really ever fallen into  
15 it, but it seems to me to make sense to clean it up and  
16 regularize it like the other motions.

17 Insofar as whether we need a two track  
18 system, cases may not move through the appellate system  
19 any faster, but I just wonder if there are cases in which  
20 it may -- which aren't appealed in which it may make a big  
21 difference whether or not the judgment becomes final after  
22 30 days or some much later day. In other words, maybe we  
23 should think about this in terms of something other than  
24 appeal cases.

25 Insofar as the rule itself is concerned, I

1 notice that they've changed the terminology and they've  
2 substituted "set aside or disregard." I think that's what  
3 they've done in the third line in part two. There's --  
4 you know, you know, Rule 301 had "notwithstanding the  
5 verdict or motion to disregard," and this says  
6 "notwithstanding the verdict or motion to set aside." My  
7 feeling would be let's keep the word "disregard" because  
8 everybody is familiar with that and everybody knows what a  
9 motion to disregard is, and now it's gone from the rules  
10 if we make this change.

11           Finally, I don't see why if we're going to  
12 say something like rule 2 should be in the rule, I don't  
13 see why it shouldn't be a separate rule. In other words,  
14 if you look at Rule 301, it's all about judgments, but it  
15 had that sentence in the middle of it about JNOV that just  
16 kind of got stuck in there at some time. Now we're going  
17 to expand that and make it a much bigger part. It's  
18 bigger than the rest of the rule put together. It seems  
19 to me maybe you peel it out and put it in a separate rule,  
20 and that way you can start thinking about it along with  
21 the other types of motions like a motion for new trial.  
22 Anyway, that's my comments. Thank you.

23           PROFESSOR DORSANEO: Well, what we did in  
24 1998 was to modernize, you know, all of these rules after  
25 a lot of discussion, and I think the 19 to 1 vote was we

1 were supposed to go back and revisit that and not embrace  
2 the court rules committee's, you know, language or it's --  
3 the way it's crafted this or the way it's revised current  
4 Rule 301, but just to see whether their ideas make sense.  
5 And I gather you're saying you like the ideas, but not the  
6 implementation.

7 MR. GILSTRAP: Exactly.

8 CHAIRMAN BABCOCK: Pete.

9 MR. SCHENKKAN: I'm -- this question may be  
10 really naive, but I'm following up on a comment Frank just  
11 made. I'm confused. Why don't we just move the substance  
12 of that sentence in the middle of 301 about the JNOV  
13 motions into Rule 329b? Why should there be -- why should  
14 JNOV be in 301 and everything else be in 329b?

15 PROFESSOR DORSANEO: Well, really the  
16 engineering, more engineering is required. I mean, this  
17 part of the rule book, like a lot of the rule book, is  
18 badly done. And it's --

19 MR. SCHENKKAN: But as a solution wouldn't  
20 it be better to have all the post -- the do something  
21 about the judgment motions in one rule?

22 PROFESSOR DORSANEO: I think a solution  
23 would be to have 329b be restricted to timetables, but  
24 take motions to modify out of 329b and to treat all of the  
25 post-verdict/post-judgment motions, you know, in one rule

1 or a series of rules.

2 MR. SCHENKKAN: That's what I was asking  
3 about. That sound goods to me.

4 PROFESSOR DORSANEO: And that's what we did  
5 in 1998 and that -- those proposals are on the table over  
6 there. They need to be revisited because it's been  
7 awhile, and there have been some cases decided, but, you  
8 know, much of that work looks pretty good to me 10 years  
9 later. And we spent a long time on it.

10 PROFESSOR CARLSON: Long time. Long time.

11 PROFESSOR DORSANEO: About a year of this  
12 committee's time.

13 CHAIRMAN BABCOCK: Bill, isn't it often the  
14 case that you get a jury verdict and then one side is  
15 satisfied and happy with it and so they move for judgment  
16 on the verdict, and the other side is not happy with it,  
17 and at the same time they move for a judgment  
18 notwithstanding the verdict or to disregard one or more of  
19 the issues, and those things are all heard before a  
20 judgment is ever entered? Isn't that the way it usually  
21 happens or not?

22 PROFESSOR DORSANEO: Yes, that's the way  
23 it's supposed to happen, but I think in a lot of  
24 circumstances the lawyer who knows what kind of motions  
25 need to be filed in order to make appellate complaints

1 doesn't get hired until after the judgment. That's when  
2 the defendant knows it's time to increase the size of the  
3 legal team. So it might not happen that way.

4 MR. GILSTRAP: Chip?

5 CHAIRMAN BABCOCK: Yeah, Frank.

6 MR. GILSTRAP: The -- that's the way it's  
7 supposed to happen. I mean, you're supposed to file the  
8 motion to disregard the jury verdict before the judgment  
9 is signed, but back before we had the motion to modify  
10 there wasn't any way to modify the judgment other than get  
11 a new trial, and that was a common vehicle for doing it.  
12 People would file a post-judgment motion for JNOV and ask  
13 the court to make the change.

14 PROFESSOR DORSANEO: And people still do it.

15 MR. GILSTRAP: Yeah.

16 PROFESSOR DORSANEO: Even though they should  
17 file a motion to modify.

18 CHAIRMAN BABCOCK: Yeah, Jeff.

19 MR. BOYD: I may not be caught up with you  
20 guys on this, but isn't the key question whether there's a  
21 reason for the rules to distinguish between a motion  
22 that's filed after verdict but before entry of the  
23 judgment versus a motion that's filed after the entry of  
24 the judgment that would change the judgment in some way?  
25 Because when I look in like 26.1(a), in its current format



1 all of those are talking about motions filed after a  
2 judgment has been entered; and it seems to me, I mean, if  
3 you look only at the question of extending the appellate  
4 deadline, that makes sense if a judgment's been entered  
5 and then some proper motion is filed that would change the  
6 judgment.

7           It makes sense that you would need to extend  
8 the appellate deadline, but it doesn't make sense to me  
9 that you would extend the appellate deadline because  
10 someone filed a motion before judgment was ever even  
11 entered because the deadline hadn't begun. Judge Benton  
12 was talking about a case that the verdict came in in  
13 August of '06 and judgment wasn't entered until January  
14 '08 because of all of these motions that were filed  
15 between the two. But once judgment is entered why does  
16 all of that -- why would all of what took place before  
17 that create a reason to extend the appellate deadline?

18           PROFESSOR DORSANEO: The only answer to that  
19 is it just makes things easier for everybody, even if it  
20 doesn't make good logical sense. In our system motions  
21 for JNOV, or called the motions to modify if they're  
22 post-judgment, I guess probably are filed as often after  
23 judgment as before. And would it make sense to say a JNOV  
24 after judgment extends the timetable but one before  
25 doesn't? We could do that.

1           The Federal system, Rule 50 motions are  
2 filed after judgment as alternatives to motions for new  
3 trial, and that's -- they just -- that doesn't seem to  
4 bother anybody.

5           HONORABLE LEVI BENTON: Chip? Chip?

6           CHAIRMAN BABCOCK: Yeah, Judge.

7           HONORABLE LEVI BENTON: You know what, I  
8 wonder if laypeople listening to us wouldn't think all of  
9 this is just really silly. Why don't we just modify the  
10 system this way and just say, you know, the trial judge  
11 shall upon motion enter an order that says, okay, "I've  
12 heard the case, I've heard some post-verdict arguments,  
13 I'm cutting off my plenary power on date X," and anything  
14 after that, tell it to our brethren. So you have an order  
15 that issues from the trial court, order the date trial  
16 court's plenary power expires, period, just so that  
17 there's no guess work.

18           CHAIRMAN BABCOCK: Yeah, Frank. Do you  
19 have --

20           MR. GILSTRAP: Insofar as --

21           CHAIRMAN BABCOCK: -- a reaction to that?

22           MR. GILSTRAP: Well, let me talk about what  
23 Jeff said first. You know, a motion for new trial, for  
24 example, can be filed before the judgment. I mean, I  
25 think they're treated as a premature filing.

1 PROFESSOR DORSANEO: Right.

2 MR. GILSTRAP: So you could say even if a  
3 motion for JNOV might be treated the same way, you know,  
4 you know, remember when the verdict comes in and you're  
5 sitting there and you say, "My gosh, we got a bad result  
6 here," you start attacking it every way you can while it's  
7 still fresh on the court's mind and while the judge maybe  
8 hadn't bought into it yet. So, you know, you're filing  
9 motion to -- you want him to disregard the jury finding,  
10 and you don't want to wait until the judgment is signed.  
11 You want him to disregard it right now.

12 There's all these reasons, and I agree, you  
13 know, maybe we need, you know, what the judge said. Maybe  
14 we need to sit down and look at this and Federalize it  
15 perhaps in some way, the way they've done it with -- you  
16 know, where it's not quite -- we don't have these hard  
17 distinctions between JNOV and motion for new trial and all  
18 that, but I think that's what Bill is talking about.  
19 Maybe we just need to reconsider this whole area, and I  
20 think what are we asking the committee's permission to do  
21 that? Is that what's going on?

22 CHAIRMAN BABCOCK: Well, I think we took a  
23 vote last time, and it was fairly clear 19 to 1, I think,  
24 that we ought to examine this whole area, and the two  
25 subcommittees that are charged with doing this just

1 haven't gotten that examination as far along as we would  
2 like. Yeah, Nina and then Jeff.

3 MS. CORTELL: I just want to make a couple  
4 of observations. One, I absolutely agree that we need  
5 more clarity in the area. There is some loopholes here,  
6 and I think it would help -- very much help our community  
7 to clarify the area. So I think providing a timetable  
8 makes sense, and while it is definitely clear that we  
9 often try to get our motions for JNOV on file before  
10 judgment is entered, sometimes there is a rush to judgment  
11 and there's simply really not time as a practical matter.

12 The other thing I think we have to remember  
13 when we talk about JNOV motions as opposed to some of the  
14 other motions is the effect given on appeal, because that  
15 is the motion or one of the ways we can preserve a  
16 rendition argument on appeal versus motion for new trial,  
17 which is just a new trial argument. So they really do  
18 different things and entitle you to different relief at  
19 the appellate court level, so they are special motions,  
20 and I think the point that Sarah made at an earlier  
21 meeting was sometimes you need time to develop all of  
22 those arguments, and so to just give the practitioner  
23 until entry of judgment and cut it off there probably  
24 would be unfair, and you have to at least -- and perhaps  
25 likely through a court allow an opportunity for some type

1 of motion post-judgment.

2           And, finally, I agree with Jeff's point. I  
3 mean, if it is only a prejudgment motion it doesn't make  
4 sense to extend the timetable based on that, so it would  
5 -- it really only makes logical sense if it's  
6 post-judgment, and then I'm sorry, but I had one other  
7 point on -- I'm in favor of a -- of two -- two timetables  
8 for the notice of appeal, one just from judgment and the  
9 alternative you have a motion extending. The problem I've  
10 encountered sometimes if a premature notice of appeal is  
11 filed, I've had district judges basically take the  
12 position they no longer have jurisdiction to do anything  
13 in the case, and I'm afraid it could create that kind of  
14 confusion if we have early notices of appeal.

15           CHAIRMAN BABCOCK: Yeah.

16           MS. CORTELL: Unless we're very clear in the  
17 rule.

18           CHAIRMAN BABCOCK: Jeff.

19           MR. BOYD: I'm still trying to wrap my brain  
20 around the rendition point that you made, so I may be  
21 missing that point completely; but your first point about  
22 if you file it after the judgment's been entered because  
23 there's a rush to judgment, what we're really saying is  
24 that it may be called a motion for JNOV, but it's really a  
25 motion to modify because you've got the judgment already

1 entered in the record; and so I'm thinking about the case  
2 law that talks about it doesn't matter what you call the  
3 pleading, it's the content, the substance of the pleading  
4 that governs; and it seems to me the logic here is that  
5 the substance really in this case is the timing, is there  
6 a judgment that you're trying to change or are you trying  
7 to affect what judgment gets entered once the verdict  
8 comes in; and if we're going to mess with the rules, maybe  
9 that's how we ought to do it, is 3 -- or 26.1 in essence  
10 would say that the timetable is extended if any proper  
11 motion is filed after judgment is entered, timely and  
12 proper after judgment is entered, such as -- and then you  
13 list them, and then if someone files a motion for JNOV  
14 after judgment is entered you know from the substance of  
15 it and the timing that it really falls under 26.1 because  
16 it was after judgment was entered and, therefore, extends  
17 the timetable.

18                   CHAIRMAN BABCOCK: That would -- wouldn't  
19 the effect of that mean that most practitioners who have  
20 lost a jury verdict would wait so as to give them more  
21 time to file a JNOV? Maybe not.

22                   MR. BOYD: Well, or they would file both.

23                   CHAIRMAN BABCOCK: Yeah.

24                   MR. BOYD: You know, if it were me I would  
25 file a JNOV, and in losing that I would then file a motion

1 for new trial to extend the time period and take one more  
2 bite at the apple.

3 CHAIRMAN BABCOCK: Yeah. Yeah, Frank.

4 MR. GILSTRAP: I'm a little leery of, you  
5 know, requiring this motion afterwards. I mean, you know,  
6 the Federal court has had this long problem with premature  
7 motions. We, I think, cut that off at the pass with our  
8 rule, and the Federal rules are there, too, but, you know,  
9 if you say that motions can only be filed after judgment,  
10 what if the judgment's not final? You know, you get into  
11 all those areas that don't exist now because we have the  
12 premature filing rule, and it seems to me, you know, I  
13 would be very careful about putting some hard moment at  
14 which, you know, a deadline before which judgments --  
15 motions cannot be filed.

16 MS. CORTELL: I agree. I think the  
17 timetable proposed under this draft makes sense to me,  
18 tying it to the motion for new trial.

19 CHAIRMAN BABCOCK: Which draft are you  
20 talking about, the State Bar draft?

21 MS. CORTELL: Yes. The timetable as I  
22 understand it for the JNOV would be the same as the  
23 timetable for motion for new trial, right?

24 PROFESSOR DORSANEO: Uh-huh.

25 MS. CORTELL: And I agree with that, and

1 that gives the practitioner the ability, of course, to  
2 file prior to judgment so all those arguments could be  
3 lodged at the time the motion for judgment has been heard.

4 PROFESSOR DORSANEO: So you think it should  
5 be overruled by operation of law.

6 MS. CORTELL: I agree with that, too.

7 PROFESSOR DORSANEO: Yeah. That's the key  
8 thing to me. That's the key question. I was asking is it  
9 hard to get one of these hearings? As I understand it, I  
10 try not to go to trial courts, but I understand that it's  
11 hard to get any kind of a hearing.

12 MS. CORTELL: I think what often happens as  
13 a practical matter is you get one shot at it. If it's at  
14 that hearing on motion for judgment then that's it, and  
15 it's hard to get sometimes further hearings. Courts think  
16 they've already vetted it. Not always, but sometimes.

17 CHAIRMAN BABCOCK: Bill, was it not only the  
18 perceived difficulty of getting the hearing but getting a  
19 ruling? Because the operation of law thing helps you when  
20 for whatever reason a judge has not decided the motions,  
21 just sitting on it.

22 PROFESSOR DORSANEO: Yeah. And you have to  
23 get -- you need to get this ruling before plenary power  
24 expires.

25 CHAIRMAN BABCOCK: Yeah. Okay. Any other



1 comments about this? Well, I think the charge has not  
2 changed from the last meeting, which is that we need to  
3 revisit this whole area, and I know Justice Hecht agreed  
4 with that, so we'll put that on the agenda for next  
5 session.

6 MR. DUGGINS: Yes.

7 CHAIRMAN BABCOCK: And you guys will combine  
8 your subcommittees and work on it. Okay.

9 The next issue, David Jackson and Professor  
10 Dorsaneo I think have something to talk about, the section  
11 16.16 of the Uniform Format Manual for Texas Court  
12 Reporters.

13 PROFESSOR DORSANEO: Angie, did we have the  
14 e-mail string copied?

15 MS. SENNEFF: I did copy it, but I'll pass  
16 them out.

17 PROFESSOR DORSANEO: David, why don't you  
18 tell the committee what the manual says now to get us  
19 started again?

20 MR. JACKSON: Well, I didn't bring that part  
21 of it, but basically what it says now is that if you play  
22 a tape in the courtroom the court reporter is not required  
23 to write it with -- contemporaneous with the playing of  
24 the tape, that the tape becomes an exhibit in the case and  
25 you submit the exhibits, and the exhibits go up along with

1 the transcript, and I know Justice Duncan had a problem  
2 with that in that the record wasn't consecutive and that  
3 you had part of a tape being admitted as evidence and  
4 having to go listen to that and not having a transcript of  
5 it, and that was a problem for her, and she wanted to  
6 repeal 16.16.

7           The discussion that we had back then is, you  
8 know, the issues that come up when you just go into the  
9 courtroom and turn on a tape recorder and require a court  
10 reporter to sit there and understand something that may  
11 not be understandable and that record go up on appeal.  
12 It's probably not going to help the appellate court anyway  
13 because it will be so far off verbatim that, you know, the  
14 "dids" and the "didn'ts" and the "is" and the "isn'ts" and  
15 the real issues that could go wrong with trying to  
16 transcribe a tape live in a courtroom under all sorts of  
17 quality control issues. You know, some courts will have a  
18 good sound system, other courts won't.

19           I started to bring you an example here and  
20 just play a tape and make you all Certified Shorthand  
21 Reporters with the skills of Mark Kislingbury, the best  
22 court reporter in the United States, and just have you tap  
23 on the table for every time you heard a word and see the  
24 problem that you come up with when you're listening to a  
25 tape and you can't understand every word. You cannot

1 write it, and it freezes you up on the whole context of  
2 the complete sentence, and you're not making a record.

3           So what Professor Dorsaneo and I got  
4 together on is a requirement that if we did change this  
5 rule to require the reporter to write it contemporaneous  
6 with the playing of the tape, that whoever presents that  
7 tape as evidence be required to also present a written  
8 transcript of that tape so that both parties can have a  
9 shot at listening in the courtroom, they can hear what's  
10 being played in the courtroom, they can look at their  
11 written transcript, and if they see something in the  
12 written transcript that doesn't match what they've heard  
13 they've got an opportunity to try to correct the record  
14 there; and at the same time when the court reporter then  
15 has to prepare the court reporter's record they have  
16 something to go by to see if they've heard everything that  
17 somebody that got the opportunity to sit and listen and  
18 rewind and listen and rewind and listen and go back and  
19 make probably a much more accurate record had the  
20 opportunity to do.

21           So the way we've come up with the proposed  
22 change incorporates the requirement that whoever presents  
23 some audiotape in court has to at the same time present a  
24 transcript of that audiotape.

25           CHAIRMAN BABCOCK: Let me just ask one

1 question, Justice Bland, before I get to you. David,  
2 under this proposal, the court reporter's record would say  
3 what has been played to the jury?

4 MR. JACKSON: Right.

5 CHAIRMAN BABCOCK: Under that proposal.

6 MR. JACKSON: Right.

7 CHAIRMAN BABCOCK: Because I alluded to this  
8 last time, but this can be a real problem. I had a case  
9 just recently, and there has been an appellate decision  
10 now, where we played -- we wanted to play a whole bunch of  
11 tapes in court, and they were videotapes, and the  
12 plaintiff vociferously objected, and so the judge went  
13 back into chambers and said, "Okay, I'm going to let them  
14 play some, but I'm not going to let them play all," and so  
15 we had the capability to edit, you know, right there on  
16 the scene the judge's rulings, but the judge's rulings  
17 were not on the record. Our editing we say comported with  
18 what the judge ruled and then we played the edited portion  
19 to the jury. Plaintiff didn't object, but the court  
20 reporter didn't take it down.

21 So you can see that something has been  
22 played to the jury, but you don't know what it was, and  
23 the plaintiff on appeal -- well, in motion for new trial  
24 objected and said that we had played something beyond what  
25 the court had ruled, and the judge said there's no record

1 of any of this so, you know, that's all waived, and it  
2 doesn't matter who wins or loses, but that could be a real  
3 problem, but this fixes that I think. So, okay, Justice  
4 Bland. I'm sorry.

5                   HONORABLE JANE BLAND: If the court reporter  
6 can't understand what is being played in the courtroom,  
7 the jury can't understand it, the judge can't understand  
8 it, and it's not an accurate record to take a transcript  
9 from outside what's being played to the jury and attach it  
10 and make it part of the record and send it up on appeal  
11 with everybody relying on the transcript when, you know,  
12 apparently it wasn't, you know, even hearable by the court  
13 reporter, and, you know, and I agree some of the tapes are  
14 difficult to hear. If that's the case, that's all that  
15 you've got in the record, whatever the court reporter can  
16 hear is all you've got, and I think it's putting parties  
17 to the expense of trying to get things transcribed when  
18 they have tapes that are clear enough, and I just don't  
19 think that's necessary, and I just don't think it's a fair  
20 record to send up to the court of appeals, and it puts  
21 undue weight on something that nobody could really even  
22 hear in the courtroom.

23                   So I think that the court reporter should  
24 take down all testimony in the courtroom, whether it's  
25 played by videotape or by a witness, who sometimes they're

1 not the easiest to hear; and we shouldn't try to do all of  
2 this stuff to, you know, clean up or improve the record  
3 with matters that are not in front of the jury.

4 CHAIRMAN BABCOCK: Judge Christopher.

5 HONORABLE TRACY CHRISTOPHER: I have the  
6 exact same comments. Also, we allow depositions without  
7 transcripts in order for people to save money, and so now  
8 you're imposing upon them either to get a court reporter  
9 at the depositions all the time or to, you know, have  
10 someone pay the costs of making a transcription of that  
11 deposition before it gets played in the courtroom, and I  
12 don't think we should make litigation more expensive by  
13 imposing that cost.

14 Then I sure don't like to be the one whose  
15 job it is to -- if people have some unofficial transcript  
16 and they're sitting there with it and the tape recording  
17 is being played and one guy jumps up and says, "Judge,  
18 that's not what's on this transcript," we have to have  
19 some sort of a stopping the proceeding. I have to make  
20 some sort of evidentiary fact-finding determination as to  
21 whether the word was "yes" or "no." That's not my job.  
22 That's the court reporter's job, okay. The court  
23 reporter, sometimes they make mistakes. We know that.  
24 Sometimes the quality of things is not great, but, you  
25 know, that's the way the record works. You know, court

1 reporters should take down what happens in the courtroom,  
2 including a tape that they can't hear, and if they can't  
3 hear the tape they say "inaudible."

4 PROFESSOR DORSANEO: Mr. Chairman?

5 CHAIRMAN BABCOCK: Yes, Bill.

6 PROFESSOR DORSANEO: Well, after David and I  
7 worked on this proposal I sent it to the appellate rules  
8 subcommittee, and you have an e-mail string that Angie has  
9 handed out that indicates what the members of the  
10 committee who responded thought about this, and you'll be  
11 able to see and I'll point out specifically in a minute  
12 that we soon -- well, maybe not too soon, but we did get  
13 to the idea that two things need to be changed probably.  
14 One is appellate Rule 13, which is duties of court  
15 reporter, and the other is this 16.16.

16 I think everybody who responded doesn't like  
17 current 16.16, everybody on the appellate rules  
18 subcommittee, and Carl has the exact thing. It says  
19 "Generally audio/video recordings played in court are  
20 entered as an exhibit in the proceedings. When the  
21 exhibits are played in court, a contemporaneous record of  
22 the proceeding will not be made unless the court so  
23 orders."

24 I think even though this uniform manual did  
25 get processed in a way through this committee I don't

1 think we focused on this 16.16, and most of the appellate  
2 lawyers with whom I've spoken just don't like the whole  
3 idea, but getting back to the 13.1 problem, right now 13.1  
4 says -- appellate Rule 13.1 says in very simple terms,  
5 "The court reporter or court recorder must, (a), unless  
6 excused by agreement of the parties, attend court sessions  
7 and make a full record of the proceedings," but it doesn't  
8 say what a full record of the proceedings actually, you  
9 know, is; and another issue that will come up in a minute,  
10 it appears that a full record of the proceeding is  
11 actually not made because some things are customarily kind  
12 of treated as not being part of the proceedings, maybe  
13 counsel's Power Point presentation or some other thing  
14 like that, demonstrative evidence, not thought by everyone  
15 to be part of the record of the proceedings.

16           What the e-mail string ultimately yielded  
17 with respect to this part of 13.1 is on page three -- let  
18 me make certain. "Well, I'm back to work on this  
19 project." See that? "First, I believe that appellate  
20 Rule 13.1(a) should state more clearly what it means to  
21 make a record of the proceedings. I suggest something  
22 like this language: 'Unless excused by agreement of the  
23 parties, attend all court sessions and make a  
24 contemporaneous stenographic record of all of the  
25 proceedings conducted in open court including the live



1 testimony of witnesses, any deposition testimony, any  
2 audio-visual recordings played in court, and any  
3 statements made by counsel, by the court, or by any other  
4 person during the proceedings.'" "

5           Now, there may be a better way to say that.  
6 Maybe I left something out, maybe it shouldn't say all of  
7 that, but I think that's better than to just say "make a  
8 full record of the proceedings" and don't give any better  
9 guidance than that. The next e-mail out said, "I have not  
10 heard from anyone. I assume that you either like or hate  
11 my proposal. Which is it?" And I got back a positive  
12 statement that that's a good way to handle 13.1(a).  
13 Justice Gaultney is responsible, I think, for pointing us  
14 to 13.1(a), saying that if this is going to be engineered  
15 in such a way that the lawyers need to know how it works  
16 that it ought to be engineered in the appellate rules and  
17 not in some court reporter manual, and those two things  
18 ought to match, and what the court reporters manual would  
19 say, you know, could be, you know, brief.

20           David Gaultney's suggestion was, I think,  
21 "Given its location and purpose, the subsection could be  
22 amended to say," meaning 16.16, "when an audio/video  
23 recording is played in court a contemporaneous record of  
24 the proceedings must be made by the official court  
25 reporter unless excused by agreement of the parties. See

1 appellate Rule 13.1(a)," and I think that the subcommittee  
2 people who responded ended up liking that approach, and  
3 maybe more should be added to 16.16 to give the court  
4 reporters better guidance. Another way to say the same  
5 thing is to exercise more control over the -- what happens  
6 in court.

7                   One more little piece and then David -- I  
8 mean, Stephen Tipps, who's in Connecticut at a wedding  
9 said, "Well, you know, there's another problem, this  
10 demonstrative evidence problem," and he suggested that  
11 something be done about that, and that's on page one of  
12 this e-mail string, the thing that could be done. 13.1(b)  
13 could read -- instead of 13.1(a), 13.1(b), which now says,  
14 "Take all exhibits offered in evidence during a proceeding  
15 and ensure that they are marked." Now, I personally think  
16 13.1(b) is not good for other reasons, but dealing with  
17 the demonstrative evidence thing and making other  
18 adjustments, I came up with this language yesterday, and  
19 this is obviously not as good as it could be or the only  
20 way this could be done: "Obtain all exhibits presented  
21 during a proceeding, including exhibits that have been  
22 marked and formally offered in evidence, exhibits that  
23 have been marked but not formally offered in evidence,"  
24 which happens, "and copies of all demonstrative exhibits,"  
25 or maybe I should say "all demonstrative evidence" or

1 "demonstrative exhibits that have been shown to the trier  
2 of facts during the proceeding and ensure that they are  
3 marked," and Stephen's idea would be that that would  
4 include everything.

5           It would include Power Point presentations  
6 and any other modern way to try cases, and it seems to me  
7 that that makes sense, and I didn't get many responses  
8 from the subcommittee members on it, so I won't say what  
9 the subcommittee thinks about it, but if the court  
10 reporter is going to make a full record of the  
11 proceedings, how do we get to a point where that doesn't  
12 happen? Huh? How did we get there? It must be because  
13 we don't say very much about it.

14           CHAIRMAN BABCOCK: Well, Judge Patterson had  
15 a comment in this e-mail string that I'd like to ask her  
16 about, and the comment was "Trials these days are visual  
17 presentations, and the appellate court should not be  
18 handicapped by withholding from it that which everyone at  
19 the trial gets to see," and I wanted to ask you  
20 practically what are you talking about? Because there are  
21 trials -- and you're absolutely right, trials are moving  
22 more in a visual and away from an oral or totally oral  
23 presentations, but if you have a time line up there that  
24 you're using in closing argument, for example, what is  
25 the -- and, you know, you say the jury is looking at this

1 time line that's up on the screen and you're saying in a  
2 closing argument "Event A happened on June 21st and event  
3 B happened on, you know, June, you know, 30th," et cetera,  
4 et cetera. How is the appellate court handicapped by not  
5 getting the time line, and what is the appellate issue?  
6 What are you not able to do when you can't -- when that  
7 time line is not in the record?

8 HONORABLE JAN PATTERSON: Well, first of  
9 all, I think this is a wholly different area than the  
10 transcriptions of tapes.

11 CHAIRMAN BABCOCK: Oh, absolutely. Because  
12 that's evidence.

13 HONORABLE JAN PATTERSON: Yes.

14 CHAIRMAN BABCOCK: Yeah, this is just  
15 demonstrative for argument.

16 HONORABLE JAN PATTERSON: And my early  
17 comments on that subject really had to do with the  
18 unintentionality of lawyers who put a time line or a Power  
19 Point, the five things you should consider --

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE JAN PATTERSON: -- and then they  
22 don't appear in the record as to what they are, and so we  
23 rely upon the record as it comes up, and the Power Point  
24 does not appear. Now, I don't know whether that's  
25 intentional on the lawyer's part or not, whether they

1 don't specify or whether they don't think that these five  
2 points that -- if I don't say them as the five points it  
3 will not appear in the record that way, but there are lots  
4 of Power Points, and it is inadvertently very often not  
5 clear in the record what that says, so I don't take a  
6 position either way. I mean, it's just something that I  
7 brought up as to the awkwardness of a record with Power  
8 Points and --

9                   CHAIRMAN BABCOCK: Yeah, I could see -- I'm  
10 sorry, Harvey. I'll get to you in a second. I can see,  
11 for example, in opening statement many lawyers will have a  
12 slide that will say, you know, it's plaintiff's position  
13 that A, B, C, D, E. It's rare -- at least in my  
14 experience, it's rare that a plaintiff's lawyer will throw  
15 it up on the screen and say, "Here's our position. Take a  
16 minute to look at it and then we'll be quiet." They never  
17 do it that way. They say, you know, "Look at our  
18 position, here's our position. Our position is A, you  
19 know, we were hurt real bad; B, that, you know, the  
20 defendants did it; and C," and they'll read it out so that  
21 it's in the record, but the only appellate issue is if the  
22 defense lawyer gets up and says, "Your Honor, I object to  
23 that video presentation," at which point the judge says,  
24 "Take it down and let's talk about it," and then it's the  
25 defense lawyer's responsibility, it seems to me, to get

1 that Power Point slide into the record if he wants to  
2 preserve error.

3 HONORABLE JAN PATTERSON: Well, I think some  
4 of what we're talking about is just the responsibility of  
5 lawyers, because I recall -- what comes to mind  
6 immediately was a condemnation case where the lawyer says,  
7 "Well, now compare this exhibit and this exhibit. Now,  
8 you see over here there's a culvert," and there's  
9 imprecision in communication of what they're asking the  
10 jury to look at because it's a visual thing. Now, I don't  
11 think that can be cured by any rule that we're addressing,  
12 so --

13 CHAIRMAN BABCOCK: And the --

14 HONORABLE JAN PATTERSON: And Power Points  
15 very often are -- I mean, one of the reasons they are not  
16 exhibits is because they're very often argumentative and  
17 not admissible.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE JAN PATTERSON: And it's for the  
20 purpose of organizing your argument and visually  
21 presenting it to the jury, and that's allowed, but it  
22 doesn't become an exhibit, so --

23 CHAIRMAN BABCOCK: Yeah, and if you're going  
24 to require the court reporter to collect the Power Point  
25 at the end of the day, that means somebody will have to

1 print it, because it's usually electronic.

2 HONORABLE JAN PATTERSON: Right.

3 CHAIRMAN BABCOCK: But for it to have any  
4 meaning for the appellate record, the record is going to  
5 have to reflect which Power Point slide was being talked  
6 about at which point in time in the trial, because  
7 typically they're not. You know, you just -- you know, I  
8 know that I've got slide No. 31. I'm going to hit a  
9 button 31 and it's going to be on the screen, but I don't  
10 say on the record, "Now you're looking at my internal No.  
11 31, and it says this, and think about this." So I'm not  
12 sure about how much utility you're going to have.

13 HONORABLE JAN PATTERSON: Well, that's  
14 right. My other early concern was this notion of cost and  
15 leaving it to the lawyers how they want to try their case,  
16 and I still think some sort of default to an alternative  
17 position would be appropriate in certain cases, but --

18 CHAIRMAN BABCOCK: Well, and I don't want to  
19 hog the conversation, but let me just make one last point.  
20 It is certainly appropriate that if there's a  
21 demonstrative to which there's an objection and the  
22 objection is overruled, then the objecting attorney, it  
23 seems to me, has a responsibility of getting that slide --

24 HONORABLE JAN PATTERSON: Yes.

25 CHAIRMAN BABCOCK: -- and saying, "Your

1 Honor, I want marked for the purpose of my objection the  
2 plaintiff's slide No. 31. You've overruled this  
3 objection."

4 HONORABLE JAN PATTERSON: Exactly.

5 CHAIRMAN BABCOCK: And now it's in the  
6 record in case we've got to fight about it later. I have  
7 ignored Harvey, and then Judge Peeples and then Judge  
8 Bland.

9 HONORABLE HARVEY BROWN: Well, the Power  
10 Point issue I think is interesting but complicated because  
11 I think there's good points on both sides. I have had a  
12 record recently where I was reading and they used the  
13 Power Point for the examination of the witness, and there  
14 it's evidence, and there's an argument about whether  
15 there's evidence on a point that was really hard for me to  
16 follow just as, you know, the appellate person reading the  
17 record without the Power Point. So I called the trial  
18 lawyer and said, "I'd like to see the Power Point." It  
19 wasn't numbered, but just flipping the pages with the  
20 testimony I understood it a lot better. You know, I might  
21 have been able to grapple through it a little bit without  
22 it, but it was tough, and there it isn't something  
23 somebody objected to, but it might be important for a no  
24 evidence appellate point.

25 So my first reaction when I heard this was



1 absolutely the Power Point needs to be in the record. The  
2 problem is I know I use Power Points in trial courts, and  
3 I don't always use the Power Point exactly like it is. I  
4 may skip a slide, because, like you, I know it's slide 31,  
5 but I have taken too long to get there, so now I'm jumping  
6 to slide 36.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE HARVEY BROWN: Or I throw up six  
9 points, but I don't even talk about three because I'm out  
10 of time, and I'm only talking about two of them, but the  
11 jury's seen them. So I think the Power Point always won't  
12 be necessarily what the jury saw and certainly won't  
13 always be what the jury hears any discussion about, so  
14 that causes a little complication on what actually gets in  
15 the record. I was also thinking about if you're going to  
16 say all demonstrative exhibits, well, what about the  
17 chalkboard? You know, I mean, are we going to make people  
18 take a photo of the chalkboard? That seems kind of silly.  
19 Flip charts are used a lot, and in final argument very  
20 effectively, and I don't think most of us want those big  
21 flip charts. I'm sure the court reporters don't want  
22 those in the record.

23 CHAIRMAN BABCOCK: Well, but there would be  
24 no reason to distinguish between the two.

25 HONORABLE HARVEY BROWN: Excuse me?

1 CHAIRMAN BABCOCK: There would be no reason  
2 to distinguish between a flip chart and an electronic  
3 Power Point.

4 HONORABLE HARVEY BROWN: Well, conceptually  
5 no, except usually the Power Point is more organized, more  
6 coherent --

7 CHAIRMAN BABCOCK: Well, says who?

8 HONORABLE HARVEY BROWN: But not  
9 necessarily.

10 CHAIRMAN BABCOCK: Says who?

11 HONORABLE HARVEY BROWN: I don't think it's  
12 necessarily an easy rule to say one way or another. I  
13 think there's good arguments both ways.

14 CHAIRMAN BABCOCK: Judge Peeples had his  
15 hand up next and then Justice Bland and Judge Christopher.

16 HONORABLE DAVID PEEPLES: I want to focus on  
17 proposed 16.16 and try to remember some realities. We  
18 tend to think about the cases we handle. I'd point out,  
19 first of all, you know, this thing -- this rule has two  
20 things. First of all, the first half of it says if you  
21 show up in court with a tape recording or something like  
22 that, you've got to have it transcribed before you can use  
23 it. That's the first part. Second part says the judge  
24 has the discretion whether to, you know, have the court  
25 reporter do it.

1                   This rule, as I see it, looks at this from  
2 the appellate perspective. I think we need to remember a  
3 small, small fraction of what happens in the trial court  
4 gets appealed, and jury cases, what, maybe five percent,  
5 maybe two or something, and family law is almost all  
6 nonjury and is hardly ever appealed, but this would  
7 require, you know, the mother who's got impeachment  
8 evidence on an answering machine or a cell phone to get it  
9 transcribed, and she can barely pay her lawyer to be  
10 there, and here's the guy in court, and he's dressed  
11 nicely, and he's got good manners, and she says he's got  
12 an anger problem, and I'd like to play this answering  
13 machine where he's out of control, threatening, cursing,  
14 and everything else. She would have to have that typed  
15 up.

16                   I would be dead set against having  
17 this you've always got to have it transcribed to show up  
18 in court with it because, number one, most cases are not  
19 appealed and it's never an issue; and two, in family law  
20 it would be horrible; and in most nonjury cases it won't  
21 be an issue. So, I mean, the second half of it I think is  
22 fine. The first half I just would really need some  
23 convincing before I could go for that.

24                   And impeachment evidence, when is that ever  
25 an issue on appeal? Hardly ever, but that's what this is

1 mostly used for, except for videotaped depositions,  
2 because the tape recordings that you use, it's almost  
3 always what somebody said in the heat of the moment, very  
4 potent. Hard to understand, yeah, that's a problem, but  
5 to make people show up with it in writing I think would be  
6 a bad mistake.

7                   CHAIRMAN BABCOCK: Justice Bland, you have  
8 been very patient.

9                   HONORABLE JANE BLAND: I agree with Judge  
10 Peeples. And as far as this issue about demonstrative  
11 evidence and Power Points and flip charts and chalkboards,  
12 we already have a whole rubric set up to deal with these  
13 things. It's the Rules of Evidence, and the burden is on  
14 the proponent to offer their materials into evidence if  
15 it's not the spoken word, and, you know, most lawyers know  
16 to mark, identify, offer, and then object. It is not the  
17 burden of the person opposing the introduction of the  
18 evidence to raise the objection until the proponent has  
19 offered it, and we -- that's worked for thousands of years  
20 -- not thousands, but however long we've had the Rules of  
21 Evidence. If somebody wants to admit their Power Point,  
22 they need to identify it for the record and offer it, at  
23 which point if there are objections to it, because it's  
24 hearsay or it doesn't fairly and accurately depict what  
25 the witness is talking about, they can be heard by the

1 trial judge.

2           If the judge includes it, it's in the  
3 record. If the judge doesn't, it's not, but to try to  
4 then, you know, have some global thing about, you know,  
5 everything's in, I feel like is going to tread on the  
6 Rules of Evidence. If somebody wants it marked for  
7 demonstrative purposes and, you know, included as part of  
8 the record but not part of the evidence in the case, that  
9 ought to be clarified by the lawyers at the time; and if  
10 it's not clarified, it's just not in there; but to try to  
11 have to start wholesale bringing in flip charts and Power  
12 Points and things like that that the parties may or may  
13 not care about being part of the record seems to me to be  
14 overkill; and, you know, I understand the difficulty  
15 without having pieces of things in the record.

16           You know, there was a case -- there was a  
17 whole background Power Point about genetic technology that  
18 neither side offered into evidence, and it was difficult  
19 from the witness's description to understand the  
20 technology at all. It didn't matter to the appeal, but in  
21 trying to describe the facts of the case, I didn't feel  
22 like I had nearly the handle on this shrimp technology  
23 that the jury did because I didn't have the Power Point;  
24 but, you know, honestly they should have just offered it  
25 if they wanted it -- wanted me to see it; and I agree with

1 Judge Peeples. So few of these cases ever get appealed.  
2 You know, we're intruding over into the Rules of Evidence  
3 that are already out there, that everybody is familiar  
4 with. I just -- I don't think it's necessary.

5 CHAIRMAN BABCOCK: Judge Christopher and  
6 then Lamont.

7 HONORABLE TRACY CHRISTOPHER: Well, I think  
8 like what Judge Peeples said. Sometimes the audio  
9 recording, the importance of it is the sound and the anger  
10 in the voice and not the actual words that were spoken,  
11 and to the extent that that was important on appeal, the  
12 appellate court might want to actually listen to the tone  
13 of voice, you know, of the tape recording, assuming that  
14 ever came to an appellate point. So I think sometimes you  
15 need the actual -- or the actual tape recording and  
16 sometimes they are too difficult to try to transcribe at  
17 all and then -- but that should be a decision by the court  
18 reporter and the parties and the judge who are listening  
19 to it rather than some blanket rule that says it's got to  
20 be done. So either we make it an exhibit, because it's  
21 difficult to hear or it's only important for its tone or,  
22 you know, we think that perhaps there needs to be some  
23 sort of a transcript about it, but we would have to change  
24 the evidentiary rule with respect to, you know, tape  
25 recordings if you can't get it into evidence unless you've

1 got a transcript of it, you know.

2                   Then we'll have this whole "I never saw the  
3 transcript," and "Boy, I'm objecting to the transcript."  
4 I mean, you know, you'd have to have a whole set of  
5 requirements for when the transcript has to be done by,  
6 when you've got to exchange it, when they get to object to  
7 it. I mean, that's a mess.

8                   CHAIRMAN BABCOCK: Okay.

9                   HONORABLE TRACY CHRISTOPHER: Oh, and one  
10 other point on the recording all the proceedings rule,  
11 changing that, 13.1(a). You don't discuss bench  
12 conferences, and I don't know whether that was on purpose  
13 or not.

14                   PROFESSOR DORSANE0: No. It was not on  
15 purpose.

16                   HONORABLE TRACY CHRISTOPHER: And, of  
17 course, you know, depending upon what part of the state  
18 you're in, the capacity of your court reporter, some bench  
19 conferences are recorded and some aren't, and to the  
20 extent that you're going to expand the rule about what the  
21 court reporter needs to do, that probably should be  
22 addressed.

23                   PROFESSOR DORSANE0: You don't think that  
24 "Any statement made by counsel, court, or any other  
25 person" would be clear enough to cover bench conferences?

1 HONORABLE TRACY CHRISTOPHER: I don't think  
2 anyone would consider that a big change in the rule, and  
3 if I normally held my bench conferences off the record, I  
4 would consider that no change in the rule because this is  
5 the way we've been doing it.

6 PROFESSOR DORSANEO: Do judges normally hold  
7 the bench conferences off the record?

8 HONORABLE TRACY CHRISTOPHER: A lot of them  
9 do. A lot of them do it.

10 PROFESSOR DORSANEO: Isn't there some judge  
11 book that tells judges they're not supposed to do that?

12 HONORABLE TRACY CHRISTOPHER: No, there  
13 isn't.

14 PROFESSOR DORSANEO: There ought to be.

15 CHAIRMAN BABCOCK: Order in court here.  
16 Lamont.

17 MR. JEFFERSON: I was going to pretty much  
18 follow up on what Judge Peeples said, which is I think the  
19 problem that we're having here is there is no way that we  
20 can create in the appellate court what happens in the  
21 trial court, whether it's evidentiary or -- I mean,  
22 there's so much that goes into a jury's decision or a  
23 court's decision, the demeanor of the parties, what  
24 they're wearing, how people move in the courtroom,  
25 inflection, voice inflections. I mean, that all can't be



1 a part of the record, and to try to have it as our goal to  
2 recreate in the court of appeals everything that happened  
3 in the trial court is just impossible.

4 CHAIRMAN BABCOCK: Yeah. Frank.

5 MR. GILSTRAP: I think we need to eat the  
6 elephant one bite at a time, and we're really talking  
7 about I think three different problems here. First of  
8 all, what we're calling the Power Point problem, which is  
9 Power Point or demonstrative evidence and that the jury  
10 sees, influences the jury, and it's not in the record.  
11 That's not what we started talking about, and I think that  
12 really could use a separate discussion because I think the  
13 whole thing becomes a morass if you mix these altogether.

14 The second problem is the playing of video  
15 or audiotapes. That's what we started talking about  
16 initially, and there is a distinction here that I think  
17 we're glossing over. There's the video -- the audiotape  
18 of, you know, Alec Baldwin going crazy on the cell phone,  
19 something like that. That's evidence. That's evidence.  
20 There's the tape, the videotaped deposition which is  
21 testimony, and that I think is what we started out dealing  
22 with. The way this current Rule 16.16 -- and I was one of  
23 the ones that was trying to mess around with drafting.  
24 It's very hard to draft a clear rule on this, but it just  
25 talks about audio/video recordings. Well, that includes

1 both kinds. I don't think it ought to include the tape of  
2 the cell phone. That's -- I don't think they should be  
3 required to put a transcript in, that that's simply  
4 evidence. Testimony is different, and I think that  
5 addresses the audio ability problem in large measure that  
6 Justice Bland was talking about.

7           The separate problem is videotaped  
8 testimony. I think that's what this rule was originally  
9 talking about. The fact that you had a witness who had  
10 been videotaped in Los Angeles, they're playing the  
11 recording, and the court reporter walked out. The idea  
12 was, no, we're going to require the court reporter to be  
13 present. He's going to have a transcript that the  
14 attorneys provide of that testimony in case he needs it,  
15 but he's going to sit there and contemporaneously record  
16 that testimony. That seems to me to be fairly simple, and  
17 that's part of the elephant I think we can eat at this  
18 time.

19           The only other problem I've got with Rule  
20 16.16 is I'm not sure what a contemporaneous record is. I  
21 mean, does that mean a transcription of the testimony? If  
22 so, we need to say that.

23           CHAIRMAN BABCOCK: Justice Bland.

24           PROFESSOR DORSANEO: That's what it means,  
25 and that's what it says.

1 CHAIRMAN BABCOCK: Justice Bland.

2 HONORABLE JANE BLAND: Well, you know, I  
3 think it is the problem that court reporters like to leave  
4 the courtroom during videotaped depositions. Obviously  
5 not our court reporter here, but it's a problem with court  
6 reporters, just like, you know, lots of court reporters  
7 will ask if the parties were willing to waive voir dire,  
8 and I think the problem the lawyers have is -- we and the  
9 judges, is we want the court reporter to be in the room  
10 when the videotaped deposition is playing, and if the  
11 court reporter is in the room when the videotaped  
12 deposition is playing the transcript is unnecessary. Now,  
13 it's helpful if the lawyers have it and can give it to the  
14 court reporter, but I don't think we should make it a  
15 requirement. The court reporter's job is to take down the  
16 testimony as it's played to the jury, not from some other  
17 source.

18 CHAIRMAN BABCOCK: David, is -- can I just  
19 ask David a question real quick? Is it difficult for you  
20 as a court reporter -- more difficult to take down video  
21 or audio recordings than it is the witness who's on the  
22 stand?

23 MR. JACKSON: Yes.

24 CHAIRMAN BABCOCK: It is. Why is that?

25 MR. JACKSON: Well, in the room you can

1 watch somebody speaking. On a videotape you can see it,  
2 but it's not quite as clear --

3 CHAIRMAN BABCOCK: Yeah.

4 MR. JACKSON: -- and you always know that  
5 you have the ability if things get out of control to gain  
6 control. With a tape, you know that that's gone, and so  
7 you know that you've got to bear down and concentrate on  
8 everything you hear and write it word for word. If  
9 there's a word that's not quite clear to you, there's no  
10 chance to get it. It's gone. It throws you off for the  
11 next couple of words trying to, you know, catch back up  
12 and get back on track. It's just more stressful to try to  
13 write something that you know you have no control over.

14 The tapes that Judge Peeples was talking  
15 about, the angry, you know, those are almost impossible to  
16 write. I mean, you know, we think when -- a court  
17 reporter is required to write a verbatim transcript.  
18 That's in our rule, "verbatim." That word is very  
19 important to a court reporter. That means every word, and  
20 when you can't hear a word or understand a word and you  
21 have no ability to get that word back, you know, it's very  
22 stressful; and in a live situation you at least have the  
23 control or the ability to get control.

24 You know whether you have access to that  
25 word, whether your audio back-up's got it, or whether

1 things were done at a time where two, three people talking  
2 at the same time, you know whether you can sort that out  
3 or not. It gets to a point where you can't sort it out  
4 and you're not making a record, you stop them, and I  
5 always sound like I'm furious at everybody when I stop  
6 them, but it's because there are 15 or 20 words floating  
7 around in the air that I don't have, and so it's a panic  
8 situation where you're trying to stop them.

9           With tapes playing you don't have the  
10 ability to have that control. If you have a transcript  
11 that you can go back to help you sort that out later you  
12 don't have to get as anxious about making the judge stop  
13 it and replay something. If you don't do that, you're  
14 going to have to change the verbatim requirement on  
15 transcribing tapes.

16           CHAIRMAN BABCOCK: Yeah, because --

17           MR. JACKSON: Because in fairness, you know,  
18 we took out this thing where you can cheaply tape-record  
19 depositions and you can go through this process, but then  
20 I don't think it's fair to at the end of the line dump  
21 that product on the official court reporter at trial to  
22 clean up the mess you've made.

23           CHAIRMAN BABCOCK: And you say it's no  
24 answer to be sitting there and the tape recorder is  
25 playing and every other word you're putting down

1 "inaudible" because you don't know what it says.

2 MR. JACKSON: Right.

3 HONORABLE DAVID PEEPLES: Can I say this?  
4 The ones I'm thinking about are easy because they're loud  
5 and it's all four-letter words.

6 CHAIRMAN BABCOCK: Bill, did you have a  
7 comment?

8 PROFESSOR DORSANEO: Yeah. I think Frank is  
9 right that we ought to break this down, and, you know,  
10 when I presented all of these alternative problems I  
11 didn't mean for us to talk about all of them without  
12 concentrating on one before we get to the next one, and I  
13 think the 13.1(a) suggestion is the place where the  
14 appellate rules subcommittee would like to hear what the  
15 committee members think, and the ones who responded did  
16 think that 16.16's current wording is bad and that a  
17 contemporaneous stenographic record of the proceedings  
18 should be made. Now, I think that's clear enough, but I  
19 would be willing to change it to something else. I copied  
20 the word "stenographic record" out of the appellate rules,  
21 which is what it's called in the rules concerning the  
22 record, and, you know, that would be a place to start.

23 Now, whether 13.1(a) needs to be clearer is  
24 a distinct issue from, you know, whether we ought to have  
25 that requirement as an understanding, and 13.1(a) is what

1 I would like to hear what people like or don't like. I  
2 put in "bench conferences before" and "any statements made  
3 by counsel," blah, blah, blah, because I think that was a  
4 good suggestion.

5 CHAIRMAN BABCOCK: Uh-huh. Okay. I think  
6 that's an excellent point. We ought to try to  
7 compartmentalize these things, but since everybody has got  
8 a head of steam up we'll just go around the room in  
9 probably an undisciplined fashion for just a minute.  
10 Justice Patterson.

11 HONORABLE JAN PATTERSON: Well, I agree with  
12 that because I think what we have to do is to decide what  
13 the problem is that we're addressing at that moment, so I  
14 agree with Frank that it's a piecemeal thing, and although  
15 I couldn't tell whether his comments about eating  
16 elephants was political or not, so, but --

17 CHAIRMAN BABCOCK: No, actually he just  
18 wants to feed the elephant.

19 HONORABLE JAN PATTERSON: I thought that the  
20 original concern was to capture the sort of thing that  
21 happened in your courtroom, what was played, and I don't  
22 think we can put the burden on the court reporters. We're  
23 not trying to replace that recording exhibit with the  
24 verbatim recording. What we want to know is what portions  
25 were played, and we can tell that from the court reporter,

1 even if it contains inaudibles, and we don't rely upon  
2 that transcript, because the other thing that we haven't  
3 spoken about is that this is a matter of fact finding. It  
4 doesn't matter that it is slightly inaudible or that the  
5 transcript says "inaudible" because you have the tape, and  
6 you have the jury, and I must confess that I have this  
7 misspent youth of spending many hours -- I may be the only  
8 person here who has actually transcribed hours and hours  
9 of tapes, and I can tell you that between Federal  
10 prosecutors and FBI agents, that's -- part of the job  
11 description is to get this perfect transcript, which a  
12 court reporter could never get for the reasons that David  
13 mentioned; and, in fact, much of it is fought over in  
14 front of the jury or can be fought over.

15           It's a matter of fact finding, so you can  
16 actually present your transcript, if you want to, and I  
17 think that's the question. If your case will carry a  
18 transcript, you present your transcript, somebody else  
19 could actually present another portion of a transcript and  
20 argue that it doesn't say this, it says that, and that's a  
21 matter of fact finding, but the bottom line is that we  
22 want to know essentially the portions of that videotaped  
23 deposition or the transcript just so that we will know  
24 what it is the jury heard. In fact, the appellate courts  
25 would probably go back to the tape recording, and we do



1 that often, that we can't rely upon -- or if the tape  
2 recording is in evidence, we go back to the tape recording  
3 as opposed to somebody's transcript. So that happens all  
4 the time.

5                   But it's -- but we're not putting the court  
6 reporter there in order to have the perfect transcript  
7 that becomes the priority bit of evidence. The other  
8 evidence should also be in the record. We want to know  
9 what happened in the courtroom, that you played excerpts  
10 1, 2, 7, and 12, and not the others, so that your case  
11 would be the subject of review.

12                   CHAIRMAN BABCOCK: Yeah, but the problem in  
13 my case was Defendant's 7 was the audiovisual recording,  
14 and the judge sustained an objection to a lot of it, and  
15 so he only permitted certain portions of Defendant's 7 to  
16 be played to the jury, and the court reporter did not  
17 write down --

18                   HONORABLE JAN PATTERSON: Right.

19                   CHAIRMAN BABCOCK: -- what was played to the  
20 jury.

21                   HONORABLE JAN PATTERSON: And that's the  
22 type of problem that this would cure, because the court  
23 reporter would get down the approximate -- the essence of  
24 what was played.

25                   CHAIRMAN BABCOCK: Right. Right.

1 HONORABLE JAN PATTERSON: And so that would  
2 make the record clear enough.

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE JAN PATTERSON: But I agree with  
5 David that our expectation is not that that becomes the  
6 evidence. That can't be possible.

7 CHAIRMAN BABCOCK: Right. Kennon had  
8 something to say.

9 MS. PETERSON: Well, when I looked at the  
10 proposal and the e-mail exchange about 13.1 and looked  
11 then at the current version of 13.1, it says "Duties of  
12 court reporters and recorders"; and one of the things that  
13 I talked with Professor Dorsaneo about is the fact that  
14 I've had at least one person interested in updating the  
15 rules governing the procedure for making a record,  
16 proceedings by electronic audio or video recording; and  
17 the question that just came to mind is, you know, what if  
18 there's a case where you have a court recorder but no  
19 official court reporter; and so the court recorder is  
20 sitting there making a detailed log of what's being  
21 recorded either audio -- by audio or visual means and  
22 whether we need to think about that when drafting the  
23 language for 13.1; and the sentence that automatically  
24 came to mind in the rules governing the electronic audio  
25 or video recording, under "Duties of court recorder" it

1 says specifically, "No stenographic record shall be  
2 required of any civil proceedings electronically  
3 recorded." So I don't know the extent to which we want to  
4 be in line with these rules or how often the rules are  
5 being used in courts around the state, but I think maybe  
6 it might be good to be mindful of them.

7 HONORABLE JANE BLAND: Now that Scott  
8 Brister is gone I'm not sure there is anybody that is  
9 using a court recorder.

10 MS. PETERSON: Well, in 2006 I know that the  
11 Supreme Court approved local rules in two counties, so  
12 it's happening. I don't think it's happening very much,  
13 but it is happening, and there are a few people who want  
14 it to happen more frequently, so it's out there to some  
15 degree.

16 CHAIRMAN BABCOCK: Yeah. We're just going  
17 to go around the room. Justice Gaultney, you had your  
18 hand up.

19 HONORABLE DAVID GAULTNEY: Yeah, I want to  
20 agree with Frank a little bit. I think we need to focus  
21 on what the problem is specifically. As I understand it,  
22 as the way I look at it, it's simply that 16.16 conflicts  
23 with 13.1. 13.1 says the court reporter will record  
24 everything that happens in the courtroom. 16.16 says they  
25 don't have to, and as a result 16.16 permits what happened

1 in your case. The court reporter is out of the courtroom  
2 while it's being played. What I think all we could very  
3 easily do to fix that problem is simply make that  
4 consistent by simply saying that -- the language I propose  
5 in the e-mail is that you'll make a contemporaneous  
6 proceeding unless excused by the parties.

7           While I've got the floor I want to make two  
8 other comments. I do have a problem with requiring the  
9 parties to do transcripts. I mean, we're dealing with an  
10 audiovisual recording, as many have said, not simply a  
11 video deposition, which I think this current proposal kind  
12 of assumes that's what we're dealing with. It deals with  
13 DWI traffic stops, you know, any number of things, which  
14 the current 16.16 permits not to be recorded, not to have  
15 a record of. So on an appeal we've got this DWI tape  
16 played. What portion of it? How much of it? When did it  
17 stop? Okay. So I think we can fix the problem by simply  
18 making 16.16 conform to the requirements, the current  
19 requirements, in my view, of 13.1; that is, you record  
20 what happens in the courtroom.

21           And then the final thing I wanted to say was  
22 I have a little problem with saying that the last bit  
23 about if there is a conflict between contemporaneous  
24 record and the written transcript, and here I think we're  
25 talking about, my assumption, a video deposition

1 transcript, that the contemporaneous rule controls for  
2 purposes of judicial review. If we're saying that the  
3 contemporaneous record will control what was played, the  
4 portions that were played, I think that's good, but if  
5 we're saying that there's -- if the court reporter made an  
6 error in transcribing it and everybody -- not everybody,  
7 but the judge knows that it was an error and that the  
8 actual video transcript is the accurate thing of what was  
9 played, why would we want to say that that error cannot be  
10 corrected? Because we have a rule in the appellate rules  
11 which provides for correction of recorder's records and  
12 for the judge to determine what actually happened.

13 CHAIRMAN BABCOCK: Okay. Thank you. Going  
14 around, Judge Peeples.

15 HONORABLE DAVID PEEPLES: Just as a matter  
16 of information, on court recorders, every county has a  
17 child support enforcement judge, and I know a majority of  
18 them and maybe all of them have a recorder and not a  
19 reporter, so this needs to be in there and we need to deal  
20 with it, but I think in ordinary district courts they are  
21 very rare.

22 CHAIRMAN BABCOCK: Okay. Justice Bland.

23 HONORABLE JANE BLAND: Two things. One is I  
24 have a lot of confidence in court reporters. They get the  
25 videotapes verbatim. In six years my court reporter took

1 down every single sound in the courtroom, including  
2 videotapes, and I had realtime, and I could see the  
3 transcript, and it matched the videotape that was being  
4 played, and so I do not believe that requiring the record  
5 to reflect what's actually played in the courtroom is  
6 going to give us a really sloppy record. The problem is  
7 more when the videotape is played and the court reporter  
8 doesn't take anything down because they think that the  
9 videotape -- you know, they've got a transcript from  
10 somewhere else.

11           So I'm not worried about the quality of the  
12 transcript if the court reporter is reporting it. I think  
13 it will be of great quality that court reporters generally  
14 have, and I do not believe that if there is a problem  
15 between what is taken down in the courtroom, what is in  
16 the transcript, that the outside transcript should  
17 control. It should be what is taken down in the  
18 courtroom, and if what is taken in the courtroom is a  
19 mistake, as Justice Gaultney pointed out, the parties have  
20 a remedy of going to the trial judge and either  
21 supplementing the record or clarifying the record, and the  
22 judge is the -- as the arbiter of what actually happened  
23 in the courtroom can decide we need to supplement the  
24 record because this part didn't get taken down or we need  
25 to correct an error in the court reporter's transcript,

1 but we have plenty of mechanisms currently on the books to  
2 take care of what I think are pretty rare situations for  
3 the court reporter to not get it down correctly.

4           And I don't think rule -- or the court  
5 reporter's manual comports with our rules, and I think the  
6 solution is just to take that out of the manual and put  
7 in, you know, the Rule 13.1, what we have now, and put it  
8 in the manual, so that it's -- you know, so that the two  
9 are together.

10           CHAIRMAN BABCOCK: Okay. Judge Christopher.

11           HONORABLE TRACY CHRISTOPHER: It has been my  
12 impression that we often get errors in the written  
13 transcripts, because it's pretty funny when we have the  
14 video deposition with the scrolling words at the bottom,  
15 so you know what the actual written transcript is because  
16 you see the scrolling words. There's often errors, lots  
17 and lots of errors. So, you know, for a court reporter to  
18 be relying only on the written transcript is not a good  
19 idea in my opinion. You know, I think -- my court  
20 reporter, she sits and, you know, she takes down the  
21 depositions that are being played, and I think that's the  
22 better record. It's what we hear in the courtroom.

23           CHAIRMAN BABCOCK: David.

24           MR. JACKSON: Well, part of my -- I changed  
25 my e-mail address right at the time. I didn't get any of

1 these e-mails, so I apologize for not responding to any of  
2 this stuff. I'm reading it for the first time today on  
3 13.1. You know, I would hate to see us just knock out  
4 16.16. I just really think we need to get some sort of --  
5 to either change the requirement of the court reporter on  
6 tapes or, I mean, you can't just carte blanche say, "Court  
7 reporters, you're required to get that." We're  
8 voice-to-text, we're not noise-to-text. You can't make  
9 text out of certain sounds. I mean, it just can't happen,  
10 and with some audiotapes that's what you're requiring us  
11 to do, and we can't do that.

12 CHAIRMAN BABCOCK: Yeah. Richard Munzinger.

13 MR. MEADOWS: Chip, can I ask a question  
14 about this point, just a little out of order?

15 CHAIRMAN BABCOCK: Yeah, okay.

16 MR. MEADOWS: I like the rule, and I like  
17 the idea of everything --

18 CHAIRMAN BABCOCK: Which rule?

19 MR. MEADOWS: This proposed language in  
20 13.1(a), because I like the idea of it -- the record being  
21 created in realtime, and David had mentioned earlier the  
22 point that if something is -- there are words in the air  
23 that are too many for him to be able to get an accurate  
24 record he could stop it, get it sorted out. That could  
25 happen in the courtroom with a video or audio. If



1 there's -- if the court reporter is having a difficult  
2 time making a record contemporaneously, I say deal with it  
3 in a contemporaneous fashion, and if it's inaudible then  
4 everybody -- you know, the judge says something or the  
5 parties say something, but it gets sorted out at the  
6 moment and not on some post-event submission.

7           CHAIRMAN BABCOCK: Yeah, the only mischief I  
8 could see created by that is if either you like the tape  
9 or you don't like the tape, the court reporter is, you  
10 know, splitting it up every couple of minutes. Maybe that  
11 diminishes the power of the tape or maybe it emphasizes  
12 the tape because you keep replaying, you know, "You  
13 mother, I'm going to get you." You know, "What was that?"

14           MR. MEADOWS: I just think then you're going  
15 to test the patience of the court and, you know, maybe  
16 somehow it happens out of the presence of the jury if it's  
17 a real problem. I just think it doesn't happen very often  
18 that the court reporter stops the proceedings because too  
19 many people are talking, yet I think the notion that this  
20 all gets tidied up later is a place where mischief could  
21 happen --

22           CHAIRMAN BABCOCK: Yeah.

23           MR. MEADOWS: -- and would complicate the  
24 whole proceeding.

25           CHAIRMAN BABCOCK: David, my sense is that

1 there are two competing policy considerations here. One,  
2 the one you've articulated about putting just too much  
3 burden and stress on the court reporter to have to, you  
4 know, write down verbatim all these sounds that are in  
5 there, against what Judge Peebles has articulated, is that  
6 it's just too much of a burden on the litigants to require  
7 it, so there's going to have to be a compromise between  
8 these two competing policy considerations, and so when we  
9 take a break maybe everybody can think about what that  
10 compromise is, but we'll keep going around the room unless  
11 other people get out of order like Meadows over there.

12 MR. MEADOWS: Excuse me.

13 CHAIRMAN BABCOCK: Frank.

14 MR. GILSTRAP: Could we maybe compromise in  
15 13.1 by saying -- instead of requiring the court reporter  
16 to transcribe any audiovisual recording, say "any  
17 audiovisual recordings of testimony"? Would that make it  
18 a lot easier? And then the cell phone tape is not  
19 transcribed. It's simply evidence, like the picture of  
20 the car wreck.

21 MR. MEADOWS: But it wouldn't be evidence  
22 unless it was offered.

23 MR. GILSTRAP: Well, it's got to be offered.  
24 That's right.

25 MR. MEADOWS: So it's going to be -- and the

1 jury's going to hear it, and the court reporter is going  
2 to take down what was said.

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: Do I understand that this  
5 Rule 16.16 is an amended rule to the court reporters  
6 manual?

7 CHAIRMAN BABCOCK: I think that's right,  
8 isn't it? Yeah.

9 MR. MUNZINGER: It's not a Rule of Civil  
10 Procedure.

11 CHAIRMAN BABCOCK: Right.

12 MR. JACKSON: Uniform Format Manual.

13 MR. MUNZINGER: It imposes an obligation on  
14 a lawyer without giving the lawyer fair notice that he's  
15 got the obligation. I've got to do a transcript. Well,  
16 where? Who told me that? Well, it's in the court  
17 reporters manual. If you're going to --

18 CHAIRMAN BABCOCK: As passed by the Supreme  
19 Court.

20 MR. MUNZINGER: If you're going to impose an  
21 obligation on me, you ought to tell me about it somewhere  
22 where I would look at it.

23 CHAIRMAN BABCOCK: Oh, this due process  
24 stuff you're always bringing up.

25 MR. MUNZINGER: Secondly, the last sentence

1 makes a statement of substantive law. "If there is a  
2 conflict between the contemporaneous record and the  
3 written transcript, the contemporaneous record will  
4 control for purposes of judicial review." That's the  
5 heart and soul of what trials are about sometimes, did he  
6 say in that telephone conversation "yes" or "no," and  
7 another problem with the rule is I've got a tape  
8 recording. I'm going to come to court, and I have my  
9 transcript. Self-interest colors memory and vision and  
10 everything else, and so in good faith I might say, "Hell,  
11 he did say 'yes.'" By god, listen to that. You hear the  
12 hiss on the 's'?" And maybe it was a hiss on an "s" of a  
13 different word, but I transcribe it "yes," and my  
14 adversary says, "He didn't say 'yes.'" He said a  
15 four-letter word."

16           So now did he say "yes" or did he say the  
17 other? The opponent of the evidence doesn't have a  
18 transcript, so now you've got a court reporter who's  
19 sitting there who's got a colored view of what the  
20 transcript is and no competing view. I don't know that  
21 you've solved any problems.

22           I guess my real point is if you're going to  
23 put burdens on lawyers and address substantive law you  
24 ought to do it in the Rules of Civil Procedure and not in  
25 a court reporters manual.

1 CHAIRMAN BABCOCK: Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Well, bringing  
3 it almost full circle from Justice Gaultney to Richard,  
4 what I heard Justice Gaultney say was that when you have  
5 essentially a conflict it should be treated like any other  
6 conflict, and the last sentence of 16.16 could be read not  
7 to do that, to say otherwise, that one trumps the other,  
8 and I don't think we want to say that, and then I agree  
9 with Richard that even if we were going to say that, we  
10 wouldn't say it here because this is instructions to court  
11 reporters. They don't get to decide what controls for  
12 purposes of judicial review. So, one, I think it should  
13 be treated like everything else, which is it gets resolved  
14 like any other conflict in the testimony; and, two, I  
15 don't think that sentence should be in the manual for  
16 court reporters.

17 CHAIRMAN BABCOCK: Okay. Bill, last word  
18 before we break.

19 PROFESSOR DORSANEO: Well, I wondered why  
20 David didn't respond to our e-mail thing because I think  
21 he was copied, but by the time we got through at the  
22 committee level with the discussion, the proposal was no  
23 longer the proposal. Okay. It's just an earlier effort.  
24 So I don't think there really is much left of that  
25 proposal, and I wasn't presenting it as something to be

1 considered.

2 CHAIRMAN BABCOCK: All right. Judge  
3 Christopher.

4 HONORABLE TRACY CHRISTOPHER: I just have  
5 one funny story before we break. Okay.

6 CHAIRMAN BABCOCK: Oh, good, a funny story.

7 HONORABLE TRACY CHRISTOPHER: In terms of  
8 demonstrative evidence and how everything is so visual  
9 now, I had a malpractice trial, medical malpractice trial.  
10 The plaintiff's malpractice expert said, "I relied on the  
11 testimony of the defendant doctor at page 16 in the  
12 deposition in coming up with my conclusion that the doctor  
13 was negligent because she said she did X." Well, of  
14 course, page 16 in the deposition included a whole bunch  
15 of objections and speaking objections and rephrasing and,  
16 you know, it was really unclear at the end of the day what  
17 the doctor had answered on page 16.

18 Well, so we talked about page 16 with every  
19 witness, but page 16 was never an exhibit. Page 16 was  
20 never read in its entirety, ever, into the record, so the  
21 jury is having a hard time figuring out what to do. They  
22 said, "Please give us page 16 of the deposition." I'm  
23 like, "Hmm, not in the record." Then they asked me,  
24 "Well, let me have the deposition -- we need the testimony  
25 of the expert where she was talking about page 16 of the

1 deposition," so we pull that up, didn't help. What I  
2 finally got the lawyers to agree to, we put page 16 back  
3 up on the big screen, brought the jury into the room, read  
4 the portion of the testimony of the expert, but all they  
5 did the whole time was write down "page 16." That's what  
6 they did.

7                   So, I mean, lawyers really need to be  
8 careful with their record, and I think we need to put the  
9 burden on the lawyers to be careful with their record.

10                   CHAIRMAN BABCOCK: Yeah.

11                   MR. MEADOWS: I couldn't agree more. I  
12 mean, most of this is about competence of trial counsel.

13                   HONORABLE JAN PATTERSON: Right. Can I add  
14 one little flavor to that? Because if you put an exhibit  
15 into evidence, it doesn't mean that you're playing the  
16 whole thing. The whole tape can be available to the jury,  
17 but it was not played in the courtroom.

18                   CHAIRMAN BABCOCK: Right.

19                   HONORABLE JAN PATTERSON: And so that's what  
20 you're trying to identify, is what was played.

21                   CHAIRMAN BABCOCK: And that happens all the  
22 time. Okay. Let's take a little break here. Be back in  
23 about 10 minutes maybe.

24                   (Recess from 10:41 a.m. to 10:58 a.m.)

25                   CHAIRMAN BABCOCK: Okay. Let's see if we

1 can finish this up, and, Bill, it sounds like you made an  
2 amendment to the proposed language on 13.1(a) by inserting  
3 "bench conferences" somewhere?

4           PROFESSOR DORSANEO: Yeah, and I put "bench  
5 conferences before" and "any statements made by counsel,"  
6 and then Ralph said you need to say not only "bench  
7 conferences," comma, "and any statements made by counsel,"  
8 you need to say "by a party," comma, "by counsel." So  
9 there is other things, and then there is another question  
10 there as to whether open court ought to be open court or  
11 whether that should be open court or in chambers or just  
12 in court. There are lots of little issues lurking in this  
13 proposal.

14           CHAIRMAN BABCOCK: Okay. Let's -- yeah,  
15 Jeff.

16           MR. BOYD: I just have one more little  
17 lurking issue that I don't want us to forget.

18           CHAIRMAN BABCOCK: What is that?

19           MR. BOYD: The idea that the court reporter  
20 does not have to transcribe if the parties agree I think  
21 is important and should be in there, but I wonder if it  
22 needs to be clear that that agreement needs to be of  
23 record somehow.

24           CHAIRMAN BABCOCK: Okay. In writing.

25           MR. BOYD: Or transcribed. I mean, it can



1 be on the record.

2 CHAIRMAN BABCOCK: Okay. "Of record" would  
3 do it?

4 MR. GILSTRAP: You're talking about 16.16?

5 CHAIRMAN BABCOCK: No, with 13.1(a) now.  
6 Okay. Yeah, Gene.

7 MR. STORIE: I have just a question. Does  
8 "audiovisual" include audio only?

9 CHAIRMAN BABCOCK: Yeah, that's a good  
10 point.

11 HONORABLE STEPHEN YELENOSKY: "Audio,"  
12 comma, "visual, and audiovisual." Well, visual wouldn't  
13 work, would it?

14 CHAIRMAN BABCOCK: No.

15 HONORABLE STEPHEN YELENOSKY: So "audio,"  
16 comma, "audiovisual."

17 MR. JACKSON: Noise-to-text is hard enough.

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE JANE BLAND: Yeah, you don't want  
20 that part. It would require you to take down --

21 HONORABLE TRACY CHRISTOPHER: I can picture  
22 the visual cues. "Sighs."

23 CHAIRMAN BABCOCK: All right. Anything else  
24 on 13.1(a)? Yeah, Frank.

25 MR. GILSTRAP: Well, I think we need to

1 consider whether or not we're going to require the court  
2 reporter to transcribe the 911 tape. In other words, I  
3 think what I was suggesting earlier is that they only  
4 transcribe audiovisual recordings of testimony, and, you  
5 know, if we want him to try to record the gunshots on the  
6 911 tape, I guess we can do that, but I think that might  
7 -- by not requiring them to do that, that might solve some  
8 of the real practical problems that have been raised about  
9 transcribing these recordings.

10 CHAIRMAN BABCOCK: Okay. Yeah, Judge  
11 Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, that's  
13 true, but then we have the problem of your case where you  
14 had a big tape, but only a small part of it was played,  
15 and the big tape is an exhibit, and you don't know what  
16 small part was played. So, I mean, we need to have --  
17 maybe we need to have you only submit into record what was  
18 played as your exhibit versus big tape.

19 CHAIRMAN BABCOCK: No. My offer was of the  
20 whole exhibit, and I objected to the judge's limiting it,  
21 so I wanted my whole exhibit in the record, and then the  
22 issue is whether or not I've got to go out and create  
23 another tape that's a subpart of that, which I can't do  
24 right at the moment, although electronically we can edit  
25 it so we can play it for the jury. We just can't create

1 another physical exhibit.

2 HONORABLE TRACY CHRISTOPHER: We do it for  
3 redacted documents --

4 CHAIRMAN BABCOCK: We do.

5 HONORABLE TRACY CHRISTOPHER: -- where you  
6 put the whole document in and the one that's an actual  
7 exhibit is the redacted document.

8 CHAIRMAN BABCOCK: But the question is whose  
9 burden is it when they're objecting, when the other side  
10 is objecting, to create a record of what was played to the  
11 jury.

12 HONORABLE TRACY CHRISTOPHER: I'm sure  
13 that's on appeal, so I -- you know, we can't weigh in on  
14 that.

15 CHAIRMAN BABCOCK: It's on appeal in  
16 Illinois so you don't have to worry about it.

17 HONORABLE TRACY CHRISTOPHER: Okay. But, I  
18 mean, it's a real problem.

19 CHAIRMAN BABCOCK: The Illinois court said  
20 that it was the objecting party's burden and that since he  
21 didn't create a record on that, there's nothing to review.

22 Yeah, Steve.

23 HONORABLE STEPHEN YELENOSKY: Well, if we're  
24 going to make the default that they have to take down  
25 everything, but they can agree not to or presumably -- I

1 don't know presumably, maybe the judge can order not to,  
2 doesn't that take care of it? They start to play the 911  
3 tape and the court reporter says, "I can't hear this, I  
4 can't take this down." The judge addresses it with the  
5 attorneys. They either agree to that or perhaps the judge  
6 can order it even absent their agreement, but to try to  
7 take into account every conceivable situation seems less  
8 wise to me than just having that out.

9 CHAIRMAN BABCOCK: Okay. Bill.

10 PROFESSOR DORSANEO: Frank, your suggestion  
11 is to add the words "of testimony"?

12 MR. GILSTRAP: Yes.

13 PROFESSOR DORSANEO: Hmm? I'd like to hear  
14 more about that. I mean, I had a case a year or so ago  
15 where we played a DVD which was something that a company  
16 had produced to talk about things that were happening in  
17 India, and it had all of these Indian dancers and people  
18 talking and it wouldn't be much of a point to take that  
19 down, even if you could manage to do it.

20 MR. GILSTRAP: Or the classic  
21 day-in-the-life video in personal jury cases, you know, I  
22 mean, are you going to require them to transcribe, you  
23 know, where the point is the guy can't walk, and that's  
24 not in the transcript. I mean --

25 HONORABLE STEPHEN YELENOSKY: The question

1 is what's the default? The default is yes. If people are  
2 reasonable people, no, they wouldn't have to transcribe it  
3 because the parties would agree.

4 PROFESSOR DORSANEO: Well, the thing that I  
5 have trouble with is this idea where -- the reason why I  
6 think we need to do something here is this idea that  
7 people just kind of come in and play stuff, you know, like  
8 it's in evidence but nobody is acting like this is a  
9 trial. It's like it's --

10 HONORABLE TRACY CHRISTOPHER: It's TV.

11 CHAIRMAN BABCOCK: It's television.

12 PROFESSOR DORSANEO: -- having breakfast and  
13 watching morning Joe. It's preposterous to me that that's  
14 the way the world has gotten to be, but --

15 HONORABLE TRACY CHRISTOPHER: Come sit in  
16 our shoes for a while.

17 PROFESSOR DORSANEO: I'm sure we marked  
18 this -- had this thing marked and had, you know, offered  
19 it in evidence for whatever purpose, and it was in  
20 evidence, and it went to the court of appeals inside, you  
21 know, the brief, and I was just curious if they ever  
22 looked at it, you know. I have my doubts, frankly, but to  
23 just -- we could have just played it and then never -- you  
24 know, never done anything more than that.

25 CHAIRMAN BABCOCK: I suppose the

1 day-in-the-life video or the DVD that's just played from  
2 beginning to end there's not much of an issue, but  
3 oftentimes in testimony, like video deposition testimony,  
4 there's a lot of editing that goes on, and so you can't  
5 just have a transcript of that or even the whole tape and  
6 know what the jury heard. Yeah, Tracy.

7 HONORABLE TRACY CHRISTOPHER: Well, and  
8 also, making the distinction of testimony versus not I  
9 think would be an extremely difficult thing for the court  
10 reporter to be making that sort of legal determination of  
11 whether something is testimony or not. Like, for example,  
12 the witness is on the stand and they're getting impeached  
13 with their deposition and you're just playing the excerpt.  
14 You're not reading it. You're just playing the excerpt,  
15 okay, so at that point that's not technically testimony  
16 because you're just being impeached with it, but you know,  
17 is that the call the court reporter is going to make? I  
18 don't think that's very workable.

19 CHAIRMAN BABCOCK: Right. And then that  
20 impeachment is completely lost on the appellate court if  
21 they can't hear -- if they can't read what --

22 HONORABLE TRACY CHRISTOPHER: And they  
23 didn't write it down.

24 CHAIRMAN BABCOCK: Yeah, if they didn't  
25 write it down.

1 HONORABLE TRACY CHRISTOPHER: Yeah.

2 CHAIRMAN BABCOCK: Okay. What we've got  
3 here is Rule 13.1(a) as amended, and the amendments I've  
4 got are that "unless excused by agreement of the parties  
5 of record" -- no, "agreement of record," "in the record"?

6 PROFESSOR CARLSON: "On the record."

7 HONORABLE JANE BLAND: "On the record."

8 CHAIRMAN BABCOCK: "On the record"? Should  
9 it be "on the record," Bill?

10 HONORABLE JANE BLAND: Or "in the record."

11 HONORABLE TRACY CHRISTOPHER: But, but,  
12 okay, can I go back to -- somebody runs up to the bench  
13 and says, "Judge, this doesn't need to be on the record,"  
14 you know, and the court reporter stops, and it's  
15 generally, you know, they need a bathroom break or  
16 something like that. I don't want to have to have some  
17 formal agreement of everybody that this can be off the  
18 record.

19 MR. JACKSON: That's what the rules require  
20 now. In a deposition I'm to get the agreement of  
21 everybody in the room to go off the record.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE STEPHEN YELENOSKY: What happens  
24 in the courtroom now is the judge says, "We're off the  
25 record," and we go off the record, so that would change

1 things.

2 MR. JACKSON: Yeah.

3 MR. MEADOWS: Unless somebody says something  
4 else. I mean, it's sort of everybody agrees by their  
5 silence.

6 HONORABLE TRACY CHRISTOPHER: Right. It  
7 needs to be a silence agreement, not an affirmative  
8 agreement.

9 CHAIRMAN BABCOCK: All right. It says,  
10 "unless excused by agreement of the parties" the court  
11 reporter will do all of these things, and the question --  
12 and maybe the "excused by agreement" is a problem, but the  
13 question now is whether it should be on the record or  
14 whether it doesn't have to be on the record. Carl.

15 MR. HAMILTON: I think we ought to turn it  
16 around the other way and put the burden on the lawyer.  
17 There are lots and lots of bench conferences held,  
18 especially in family law cases, that are not put on the  
19 record, and without having to have an agreement beforehand  
20 maybe just put the burden on the lawyer if one lawyer  
21 wants it on the record then he has to say so.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE TRACY CHRISTOPHER: Yeah. We've  
24 got to be real careful with bench conferences because I  
25 think that there's this whole, you know, universe of how



1 you handle those questions if we're including bench  
2 conferences in this rule. I really agree.

3 CHAIRMAN BABCOCK: Okay. Well, let's skip  
4 that for a minute. The rule that is on page three of this  
5 e-mail exchange says "unless excused by agreement of the  
6 parties, attend all court sessions and make a  
7 contemporaneous stenographic record of all of the  
8 proceedings conducted in open court, including the live  
9 testimony of witnesses, any deposition testimony, any  
10 audio," comma, "audiovisual recordings played in court,  
11 and all statements made by a party, by a counsel, by the  
12 court, or by any other person during the proceedings,"  
13 and -- I'm sorry, I meant to put in bench conferences, so  
14 it should say "audiovisual recordings played in court,"  
15 comma, "bench conferences, and any statements made by a  
16 party, by counsel, by court, or by any other person during  
17 the proceedings," and that's the rule that we're dealing  
18 with right now, having skipped the whether the agreement's  
19 got to be in the record or not. Are there problems --  
20 forgetting about the "of the record" thing, are there  
21 other problems with this rule as amended now?

22 HONORABLE STEPHEN YELENOSKY: The bench  
23 conference issue. Are you separating that?

24 CHAIRMAN BABCOCK: Well, we --

25 HONORABLE TRACY CHRISTOPHER: I mean, is

1 open court a bench conference?

2 CHAIRMAN BABCOCK: Well, that's what Bill  
3 put in there because you raised it, because you're the one  
4 that wanted it in there.

5 HONORABLE TRACY CHRISTOPHER: No, I don't  
6 want it in there.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TRACY CHRISTOPHER: I mean, I  
9 record my bench conferences, okay, but I'm just -- I'm  
10 bringing it up as an issue that this rule is unclear.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE TRACY CHRISTOPHER: But, you know,  
13 I want latitude to say, "Yeah, yeah, you don't have to  
14 record this" when we're talking about whether we're going  
15 to leave at 5:00 o'clock or 4:30 because I'm out of  
16 witnesses.

17 CHAIRMAN BABCOCK: Right.

18 PROFESSOR DORSANEO: Open court is an issue  
19 to me.

20 CHAIRMAN BABCOCK: Okay. Let's stick to  
21 bench conferences right now.

22 PROFESSOR DORSANEO: Well, you asked if  
23 there were any other issues.

24 CHAIRMAN BABCOCK: I know.

25 HONORABLE STEPHEN YELENOSKY: On bench

1 conferences in jury trials at the beginning, because my  
2 bench is about from here to there to the jury, I ask the  
3 lawyers if they'll agree to the default that if they come  
4 up to the bench it's not on the record unless they ask for  
5 it. So I have an agreement on the record that the default  
6 is they have to ask for it.

7 CHAIRMAN BABCOCK: So you want to take it  
8 out?

9 HONORABLE STEPHEN YELENOSKY: Well, no, I  
10 mean, I can do that under that rule because I just get an  
11 agreement at the beginning of trial that the default is  
12 unless you ask for it you're not getting a record because  
13 I'm going to have to send the jury out. They say, "fine,"  
14 and from then on they don't ask for it, they don't get it.

15 CHAIRMAN BABCOCK: So you want it in?

16 HONORABLE STEPHEN YELENOSKY: Well, no, I'm  
17 just saying that I don't know because I don't know what  
18 other judges' issue is with that. I think that's an issue  
19 as to when it is going to be a substantive discussion. If  
20 it's we're going off the record because we're going to  
21 talk about when we're going to break, that's the judge  
22 using discretion to determine whether or not there's  
23 something that is appropriately about the trial that --

24 CHAIRMAN BABCOCK: Uh-huh.

25 HONORABLE STEPHEN YELENOSKY: And that's a

1 different -- that's not really about bench conference as  
2 much as can the judge determine when we're sort of in  
3 trial and when we're not.

4 CHAIRMAN BABCOCK: Munzinger.

5 MR. MUNZINGER: I'd like to leave the word  
6 "bench conferences" in because your client's rights can be  
7 affected by the bench conference. There can be a dispute  
8 as to what was said or done at the bench conference. If  
9 there is a dispute, the record is made. If the judge  
10 wants to talk about whether we're going to have -- quit at  
11 4:30 or 5:00, the judge need only say, "This is not a  
12 bench conference requiring a record. It's an  
13 administrative matter for counsel to decide," and we can  
14 all do that.

15 The rule as drafted would allow attorneys to  
16 waive the requirement of a bench conference in that type  
17 of a thing anyway, but I've been in a lot of courts in a  
18 lot of places where not all things that happen off the  
19 record at a bench conference are as pristine pure as they  
20 are in Houston and Dallas and some other places.

21 HONORABLE STEPHEN YELENOSKY: Austin.

22 MR. MUNZINGER: Sorry, and Austin and  
23 El Paso.

24 HONORABLE STEPHEN YELENOSKY: I knew you  
25 meant to include us.



1 MR. MUNZINGER: But I like bench conference  
2 in there --

3 CHAIRMAN BABCOCK: And San Antonio.

4 MR. MUNZINGER: -- because my client's  
5 rights are affected by bench conferences far too often.

6 CHAIRMAN BABCOCK: Yeah, fair enough. Any  
7 other comments about bench conferences? Judge Peeples.

8 HONORABLE DAVID PEEPLES: I think it's good  
9 to have this rule that basically says the lawyer doesn't  
10 have to beg the judge and make a judge mad to insist that  
11 something be on the record. That's good. Bench  
12 conference, let me just tell you-all something that  
13 happens and ask you how it ought to be handled. Let's say  
14 that we're doing voir dire, and I'm up here, and the jury  
15 panel is out there, and the court reporter is about where  
16 she is because the court reporter wants to be near the  
17 jury panel so she can hear their -- what they say. Okay.  
18 And the lawyers are saying something and if -- you know,  
19 it could be as innocuous as "I'm getting ready to break  
20 for lunch" or "Is this a good time to break for lunch?"  
21 If I can call them up, you know, it might be about  
22 something, "Listen you're getting close to the motion in  
23 limine here, be careful" or "The way you're wording this  
24 is a little problematic." If that's got to be on the  
25 record, if I can't just call them up and say so-and-so,

1 she's got to stop, unplug, walk up here, put her machine  
2 down, and it just slows things down.

3 HONORABLE TRACY CHRISTOPHER: Very  
4 problematic. Never record those.

5 HONORABLE DAVID PEEPLES: Okay. And let me  
6 just say, if this bench conference is in here, I know it's  
7 something harmless like that, I just tell you I'm just  
8 going to motion them up and I'm not going to wait for the  
9 court reporter, because nobody is going to care if it's on  
10 the record. Okay.

11 Now, but suppose something does happen in  
12 that situation and there is an appeal and somebody wants  
13 -- you know, there was something off the record.  
14 Was error not preserved? I violated a mandatory rule. I  
15 didn't get their agreement, but nobody objected.

16 HONORABLE STEPHEN YELENOSKY: That's the  
17 question.

18 HONORABLE DAVID PEEPLES: There will be a  
19 waiver, won't there?

20 HONORABLE STEPHEN YELENOSKY: It depends on  
21 how we write the rule.

22 CHAIRMAN BABCOCK: Well --

23 HONORABLE TRACY CHRISTOPHER: This is in a  
24 court reporter manual. You've got to remember that, too.

25 HONORABLE DAVID PEEPLES: No, 13.1.

1 HONORABLE TRACY CHRISTOPHER: Oh, okay. All  
2 right, sorry.

3 HONORABLE DAVID PEEPLES: On the other hand,  
4 if there's a bench conference and there's a witness and  
5 the court reporter is right over here, a lot of them have  
6 a little microphone thing right there, and they just keep  
7 right on going.

8 CHAIRMAN BABCOCK: Harris County has got the  
9 white noise. Does that work?

10 HONORABLE JANE BLAND: No. I just tried a  
11 case a couple of weeks ago. The court reporter wouldn't  
12 let me do it.

13 HONORABLE TRACY CHRISTOPHER: The problem is  
14 the jury starts talking because they think that we can't  
15 hear them, and they're right next to the reporter and then  
16 the lawyers don't want to talk loudly because they think  
17 the white noise doesn't really work.

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE TRACY CHRISTOPHER: So they're  
20 whispering, and then the court reporter can't hear  
21 anything.

22 CHAIRMAN BABCOCK: Yeah, and you're trying  
23 to tell the jury not to talk, but they can't hear you.

24 HONORABLE TRACY CHRISTOPHER: Right.

25 CHAIRMAN BABCOCK: But you can hear them.



1 What a mess. Judge Patterson.

2 HONORABLE JAN PATTERSON: Well, it does seem  
3 to me that in that instance there was no timely objection  
4 and it was ministerial, but I think the other important  
5 thing is that we want to have a bright line for court  
6 reporters so that they know what their job is and that  
7 they independently are required to perform that judge --  
8 that job and it's not dependent upon whether the judge  
9 wants it in the record or not, because I have appeared in  
10 courts where somehow things mysteriously did not appear in  
11 the record. I think we've all been there in Austin and  
12 elsewhere, and I think it's important that the court  
13 reporters who have their own jobs to do are called upon to  
14 do their jobs independently of the judge. So I would  
15 strongly urge that bench conferences be included. I think  
16 most judges would like it to be clear, and I think you can  
17 call something ministerial or bathroom break, and no one  
18 is going to be upset about that. Certainly not the  
19 appellate courts.

20 CHAIRMAN BABCOCK: Justice Gaultney.

21 HONORABLE DAVID GAULTNEY: I'll try to  
22 reurge my argument. I think the rule is fine like it is.  
23 If we add all of these includings, includings, includings,  
24 includings, are we suggesting that there's something that  
25 happens in court that by default the court reporter is not

1 going to be expected to record? I think my reading of the  
2 current rule is that by default a party going into a court  
3 of record can expect a record to be made of -- a full  
4 record to be made of what happened in the courtroom,  
5 unless by agreement of the parties.

6 Now, what that allows is a party to insist  
7 on that right. Now, they could waive it by not objecting  
8 or by agreement, but at least the default ought to be, I  
9 believe, as it's written now, and then the individual  
10 things about bench conferences, deposition testimony, all  
11 these various specifics, I'm not sure they're necessary.

12 HONORABLE STEPHEN YELENOSKY: Right.

13 CHAIRMAN BABCOCK: Okay. We're about to  
14 vote on bench conferences, so anything more on bench  
15 conferences? Harvey.

16 HONORABLE JANE BLAND: But, Chip, can't we  
17 vote on whether we want any change at all? Because it  
18 seems like bench conferences, I don't know how to vote on  
19 that.

20 HONORABLE STEPHEN YELENOSKY: Right.

21 HONORABLE JANE BLAND: And also, judge -- I  
22 mean, the problem is not with the rule. It's with this  
23 court reporter's manual instruction that is inconsistent  
24 with the current rule.

25 CHAIRMAN BABCOCK: Right.

1 PROFESSOR DORSANEO: Mr. Chairman?

2 CHAIRMAN BABCOCK: Yes, Bill.

3 PROFESSOR DORSANEO: I think that there is  
4 at least a little bit of a problem because it doesn't say  
5 how to make a full record. If all of that including stuff  
6 is going overboard, "contemporaneous stenographic record"  
7 is better than saying "a full record," isn't it? I mean,  
8 full record, you could do exactly what 16.16 says. I'm  
9 making a full record. I'm just making it by using some  
10 other thing than my machine.

11 HONORABLE DAVID GAULTNEY: Except it also  
12 includes the clause "attend court." If you're leaving the  
13 courtroom you're not attending the court session.

14 PROFESSOR DORSANEO: They came in the  
15 morning and went out -- but it doesn't say stay there. I  
16 mean, that's how people are interpreting that.

17 HONORABLE DAVID GAULTNEY: Well, I think  
18 that's because 16.16 allows them to do that.

19 PROFESSOR DORSANEO: Even without 16.16  
20 somebody could say, "I'm supposed to attend and I'm  
21 supposed to do my job. My job is make a full record, and  
22 I do that mostly by stenographic recording, but in some  
23 other circumstances I do it another way." So I don't  
24 think anything needs to -- absolutely needs to be changed.  
25 We could just leave it the way it is, but I think it would

1 at least be better if we said "a contemporaneous  
2 stenographic recording." And whether we go with all this  
3 other more details depends on how much you want to say and  
4 how much you don't.

5 CHAIRMAN BABCOCK: Okay. Harvey, and then  
6 Richard Munzinger.

7 HONORABLE HARVEY BROWN: Well, I do think we  
8 need to change the rule because courts are doing it  
9 differently all across the state, so that means to me the  
10 rule's not clear. Lawyers don't know what the rules are.  
11 You have to ask when you go in courtrooms, you know, how  
12 do you handle bench conferences, et cetera, so that to me  
13 suggests the rule is not clear.

14 I wonder if we could say something like,  
15 "bench conferences except on administrative matters," or I  
16 don't know if that would work, but I understand Judge  
17 Christopher's point. I think it's a good one. To me you  
18 could say "bench conferences on substantive matters." In  
19 other words, flip it the other way, but, I mean, to --  
20 going back to Judge Peeples' comments on voir dire, if you  
21 called somebody up and said, "I don't want you to ask this  
22 question in voir dire this way," yeah, if they don't  
23 object it would be waived, but during the heat of the  
24 moment a lot of times that's not what they're thinking  
25 about. They're thinking the court reporter is in the

1 courtroom taking it, so that person -- that might be very  
2 important to them that you've just changed that question.  
3 Two words in a question can change the meaning a lot to  
4 the lawyer, and so I would think that should be reported,  
5 so I think we need bench conferences, maybe some  
6 exceptions for administrative matters, but if we're going  
7 to have that it should be in the rules.

8                   CHAIRMAN BABCOCK: Richard Munzinger, and  
9 then Judge Christopher.

10                   MR. MUNZINGER: I just want to respond  
11 briefly to Justice Gaultney. In the text of the rule as  
12 it now exists -- as proposed, rather, it states  
13 "proceedings in open court." A newspaper reporter sits in  
14 the back of the courtroom. He or she does not hear what  
15 goes on at the bench conference. The bench conference  
16 could very well determine the substantive rights of the  
17 party to the proceeding on a very important point. Now,  
18 the court reporter could go and get that ruling  
19 presumptively later, but the point is to just simply say  
20 everything that occurs in open court, the jury doesn't  
21 hear bench conferences. Did that happen in open court?  
22 It didn't happen in open court. The spectators didn't  
23 hear it. The party to the lawsuit didn't hear the bench  
24 conference. That did not occur in open court in my  
25 opinion.

1 I believe it needs to say "bench conference"  
2 because all of us who are trial lawyers know, by golly,  
3 bench conferences are important. I mean no disrespect to  
4 the bench, that's here, but the proceedings are not  
5 conducted for the bench. They are conducted for the  
6 parties and for the parties' opportunity to obtain justice  
7 in a dispute that cannot be settled. It can be of  
8 critical importance to their lives, fortunes, or sacred  
9 honors, and do it right.

10 MR. MEADOWS: So what if the -- I'm sorry.  
11 So what if the court says, "We'll take the bench  
12 conference in chambers"?

13 MR. MUNZINGER: Take the court reporter in  
14 there if you're going to determine my substantive rights.  
15 Did that happen in open court? It did not.

16 MR. MEADOWS: I'm just saying, do we need to  
17 then say something about matters that happen in chambers?

18 MR. MUNZINGER: Well, I would think that  
19 would be a bench conference, but if not it certainly seems  
20 to me that a lawyer and an appellate court would  
21 understand that if a rule requires that a bench conference  
22 is recorded, that a conference in chambers where  
23 substantive rights are addressed should be recorded unless  
24 the parties agree not to do so.

25 MR. MEADOWS: Look, I sort of agree with all

1 these sentiments, but I feel that I have the right right  
2 now and exercise the right now to have matters put on the  
3 record. If Judge Peeples wants to say something to me  
4 along the lines of the voir dire or somebody wants to talk  
5 to me about a lunch break, I'm not going to ask for it to  
6 be put on the record, but if -- the only thing I care  
7 about is if I ask for it to be put on the record and the  
8 judge says "no" and I don't have anything to control that.  
9 As long as it's understood that I've got the right as a  
10 litigant, party, lawyer, to ask for it to be on the  
11 record, which I feel I do, and I've never been -- in state  
12 court certainly never had it denied, then I don't -- I  
13 feel like I have all the protection I need.

14 CHAIRMAN BABCOCK: Judge Christopher.

15 HONORABLE TRACY CHRISTOPHER: I want you all  
16 to think of the consequences of requiring all bench  
17 conferences to be recorded, because if you're contending  
18 that there are some bad judges out there that are keeping  
19 things off the record because they're bad judges, the next  
20 thing that's going to happen if this rule is imposed is  
21 that instead of calling you up to the bench and telling  
22 you that you're violating the motion in limine, the judge  
23 is going to say out loud, "Counsel, you're violating the  
24 motion in limine, stop it," or the judge is going to say  
25 out loud, "Counsel, that question is inappropriate. You

1 can ask it if you want to, but I'm not striking anybody  
2 for cause based on that question. So you're getting the  
3 jury all riled up, the jury panel all riled up, with this  
4 question, but it's not going to help you get anybody  
5 struck for cause."

6 CHAIRMAN BABCOCK: But at least it's on the  
7 record.

8 HONORABLE TRACY CHRISTOPHER: It's going to  
9 be on the record. I mean, you know --

10 MR. MUNZINGER: It may have a prophylactic  
11 effect on counsel, too. Maybe he'll obey the court's  
12 order in limine.

13 HONORABLE TRACY CHRISTOPHER: But that's  
14 going to happen.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE TRACY CHRISTOPHER: Lawyers who  
17 want to approach the bench and make an argument at the  
18 bench, the judge is going to say, "No, make your  
19 argument."

20 CHAIRMAN BABCOCK: Judge Peeples.

21 HONORABLE TRACY CHRISTOPHER: You know,  
22 "It's too difficult for my court reporter to take down  
23 everything that's said at a bench conference. I don't  
24 want to have to send the jury out. Make your argument."

25 CHAIRMAN BABCOCK: Judge Peeples.



1 HONORABLE DAVID PEEPLES: I think I'm in  
2 favor of the language that's proposed here with the  
3 addition of "bench conferences." I make these points,  
4 because Bobby Meadows is exactly right. A lawyer who is  
5 willing to do it can get every bit of this by asking for  
6 it, but there are parts of the state where if I were a  
7 lawyer I would feel better to have this so when I insist  
8 on something being on the record I can kind of point to  
9 the rule instead of saying in effect, "Judge, I don't  
10 trust you." It's "Judge, the rule says so," and, you  
11 know, to me if it's not important and I don't have it on  
12 the record, it's never going up. Hardly anything is  
13 appealed anyway. I mean, hardly anything is appealed that  
14 happens in the trial court, statistically, percentagewise.

15 I just think we can of live with this, and  
16 it will be ignored a lot of the time on things that not  
17 one person in this room would want on the record, and if  
18 it's important and somebody -- the judge ignores it and  
19 the stupid lawyer doesn't ask for it, it's waived. We can  
20 live with that, can't we?

21 CHAIRMAN BABCOCK: Judge Yelenosky.

22 HONORABLE TRACY CHRISTOPHER: Well, no,  
23 because I don't like to ignore a rule. Okay. I mean, if  
24 the rule says I've got to record all bench conferences,  
25 okay, I'm not going to call lawyers up during voir dire

1 when I know that's not going to get recorded, because my  
2 court reporter is sitting down by the jury and not up at  
3 the bench, and I'm not going to wait five minutes to have  
4 her unhook and rehook, you know, to get the bench  
5 conference. I'm not. You know, I don't think you should  
6 put the trial judge into a position of disregarding the  
7 rule or making sure every single time that, you know, is  
8 this substantive, is this administrative.

9           HONORABLE STEPHEN YELENOSKY: Well, but the  
10 question to me, again, is what's the default for the  
11 judge, and I agree with Judge Peeples. If the default is  
12 that we take bench conferences, that doesn't necessarily  
13 lead to this result, particularly if it's either implicit  
14 or explicit that what happens -- what happens if the judge  
15 doesn't follow the default.

16           HONORABLE TRACY CHRISTOPHER: But --

17           HONORABLE STEPHEN YELENOSKY: If it's  
18 explicit or implicit that there's no preservation of  
19 any error unless you make an objection or we could  
20 explicitly put in here with respect to bench conferences  
21 that it requires, you know, that it be asked for if you're  
22 concerned that you're violating the rule. I don't know,  
23 but I understand the point that maybe that lawyers need to  
24 be able to rely on the rule.

25           The question is what's the default and how

1 do you preserve error, and if those are dealt with  
2 correctly -- and at least the way Judge Peeples reads this  
3 -- then I don't see a problem with it because I can  
4 continue to do what I'm doing right now, which I think is  
5 the appropriate way, which is if there's a question, get  
6 the lawyers to agree up front. If it's something  
7 innocuous, don't even worry about it unless somebody  
8 objects.

9                   HONORABLE TRACY CHRISTOPHER: But if you're  
10 -- I'm sorry. If you're the kind of judge that's going  
11 to, you know, make really bad rulings in bench conferences  
12 and keep them off the record, okay, if that's what you all  
13 are all afraid of, that there's some really bad judge out  
14 there that, you know, is making substantive rulings at  
15 bench conferences and you've got no record of it and your  
16 rights are being affected as a result of that, well, that  
17 same judge is going to say at the very beginning of the  
18 trial, "Well, you know, we don't record bench conferences  
19 here in this county. That's okay with you, isn't it,  
20 counsel?" And then you're in the same position of saying,  
21 "Oh, no, Judge, I really have to stand on my rights to  
22 have bench conferences recorded because I don't trust  
23 you."

24                   CHAIRMAN BABCOCK: Judge Benton had his hand  
25 up a minute ago.

1           HONORABLE LEVI BENTON: I think at some  
2 point, you know, we have to rely upon the law schools of  
3 the country to train people to demand their substantive  
4 rights, and so I agree with Judge Christopher. Now, on  
5 the other hand, when we have pro se people I think  
6 generally all of us bend over backwards to make sure there  
7 is a record with a pro se, no matter what's happening, and  
8 I just -- you know, I tell people up front, "We're not on  
9 the record at the bench. If you want a record, you have a  
10 right. Just tell me and I'll send the jury out."

11                   But I don't think we need -- there's the  
12 other thing that she didn't raise. You know, what about  
13 the judge who then doesn't expressly follow the rule? It  
14 puts that judge in the position of even if there's not a  
15 substantive issue in the case, the complaint filed with  
16 the Ethics Commission. I think it's overkill if you can't  
17 -- if lawyers aren't trained to demand their rights, then  
18 God help us.

19           CHAIRMAN BABCOCK: Frank, and then Bobby.

20           MR. GILSTRAP: The default position is that  
21 the court reporter has got to be there, and if the court  
22 reporter is not there, it's reversible error, I think. I  
23 mean, if you -- you know, if you ask for a record and they  
24 can't produce it, that's reversible error. I mean, I  
25 just --

1 CHAIRMAN BABCOCK: Is that in the record?

2 MR. GILSTRAP: I think it used to be  
3 different. Didn't it used to be that we had to ask for  
4 the court reporter to be present, and then we changed it?  
5 Now we say the default position is the court reporter has  
6 to be present. Well, that's the kind of history we've got  
7 here, and I don't know that it's enough to say, okay, we  
8 won't record the bench conferences or it's okay and -- or  
9 simply not record them. I think if there's a bench  
10 conference that's not recorded and there's no agreement, I  
11 think you might have reversible error.

12 CHAIRMAN BABCOCK: Okay. Bobby and then  
13 Judge Christopher.

14 MR. MEADOWS: Well, I may have a possible  
15 fix, but maybe not. Instead of saying "unless excused by  
16 agreement," we could say "unless waived by the parties"  
17 all these things will happen; and what we're talking about  
18 right now that seems to be, you know, causing some concern  
19 is the very last part of this, which is "any statement  
20 made by counsel, by the court, or by any other person  
21 during the proceedings"; and if we -- which seems to me to  
22 catch the bench and chambers and open court, but I guess  
23 we could say, "during the proceedings, whether in court,  
24 in chambers, or at the bench."

25 So then you've got -- then somebody has

1 to -- then the question is waiver, and it seems to me  
2 silence can be a waiver. People come to the bench and if  
3 you don't say you want it, you've waived it, and that way  
4 then you can have this sort of -- it could happen in a  
5 more reasonable way so that you don't have to be worrying  
6 about some kind of statement of agreement on the record.  
7 If you don't say "I want it" then you've waived it.

8 CHAIRMAN BABCOCK: Okay. Somebody else had  
9 their hand up, no? Okay. Harvey.

10 HONORABLE HARVEY BROWN: I kind of like that  
11 idea because one thing I would do sometimes is I would  
12 call people up to the bench and say, "Can we go off the  
13 record," and so in your voir dire example, Judge  
14 Christopher, you could just say, "I'd like to go off the  
15 record for a minute." They come up to the bench, you tell  
16 them, and if they don't object and say, "No, I don't want  
17 to go off the record," that would be covered. That allows  
18 you to do things informally, and you just kind of announce  
19 it, but if they don't like it, they have to come out and  
20 say, "I don't want that."

21 HONORABLE STEPHEN YELENOSKY: But you're  
22 requiring the announcement.

23 HONORABLE HARVEY BROWN: Yeah, you just  
24 say --

25 HONORABLE STEPHEN YELENOSKY: Whereas now

1 you just call them up and unless they --

2 MR. MEADOWS: And what the judges usually  
3 say is "Do we need this on the record?" And typically no  
4 one says a thing. It just happens, and if I want it on  
5 the record, I say, "No, I'd like to have this on the  
6 record."

7 HONORABLE STEPHEN YELENOSKY: Well,  
8 typically during voir dire, in Judge Christopher's  
9 example, that doesn't happen. If I interrupt somebody in  
10 voir dire and call them up, I just start telling them. I  
11 don't say, "Do we need this on the record," and nobody  
12 says anything. But if you want to impose that  
13 requirement, that's new.

14 CHAIRMAN BABCOCK: Bill, then Alistair.

15 MR. MEADOWS: If what you're saying is  
16 really bothering me I would say, "I'd like to have this on  
17 the record, if you don't mind," if it amounts to a ruling.

18 HONORABLE STEPHEN YELENOSKY: That's fine,  
19 but you're saying that I have to announce or ask, "Can we  
20 go off the record" rather than putting the burden on the  
21 lawyer to say, "I'd like this on the record."

22 HONORABLE LEVI BENTON: Yeah, I mean, can't  
23 we rely on --

24 THE REPORTER: I can't hear you. I can't  
25 hear you.

1                   CHAIRMAN BABCOCK: The court reporter can't  
2 hear you.

3                   HONORABLE JANE BLAND: Inaudible.

4                   HONORABLE TRACY CHRISTOPHER: That was not  
5 open court.

6                   MR. DAWSON: Judge Benton, you are not on  
7 the record.

8                   CHAIRMAN BABCOCK: Okay. Bill and then  
9 Alistair. Were you finished, Judge? I'm sorry. Bill and  
10 then Alistair.

11                   PROFESSOR DORSANEO: It might be better to  
12 talk about -- I almost have a hard time saying the word  
13 "waiver." It's a word I don't like, but it seems to me  
14 that the way it's worded now is okay. I mean, an  
15 agreement doesn't have to be, you know, under seal. It  
16 can be an implied agreement. I'm teaching torts now, and  
17 one of the justification cases is some lady who's on a  
18 ship and she's going to be in quarantine unless she gets a  
19 little certificate and gets vaccinated, and she stood in  
20 line, and she got vaccinated after saying that she didn't  
21 -- that she had already been vaccinated, and, well, that  
22 was just consent. You know, she just went along with it.

23                   HONORABLE STEPHEN YELENOSKY: Well, every  
24 time you go to a restaurant it's implied consent. You sit  
25 down, they serve you, and then they bring you the bill.



1           MR. MEADOWS: I agree, by the way, that -- I  
2 mean, I don't mind -- I mean, "waiver" is not a word that  
3 I really think changes -- I mean, you can have the word --  
4 the language as it is now, and I think silence is an  
5 agreement.

6           CHAIRMAN BABCOCK: Yeah. Alistair.

7           MR. DAWSON: I think that the trial courts  
8 ought to have the discretion to have discussions off the  
9 record for any number of reasons, and it seems to me that  
10 the burden ought to be on the lawyer. If they want  
11 something on the record the burden ought to be on the  
12 lawyer to request a record. I don't think you ought to  
13 have necessarily an agreement, because what happens if the  
14 other side doesn't agree, but if I want something on the  
15 record and I request it, I'm going to get it on the  
16 record. That's the way the system operates, and the rule  
17 ought to be consistent with that.

18           CHAIRMAN BABCOCK: Judge Christopher, did  
19 you have anything?

20           HONORABLE TRACY CHRISTOPHER: Well, I did,  
21 and we've been talking about trials. The way the rule is  
22 written it says "court session."

23           HONORABLE STEPHEN YELENOSKY: Right.

24           HONORABLE TRACY CHRISTOPHER: Which --

25           HONORABLE STEPHEN YELENOSKY: Motion for

1 summary judgment.

2 HONORABLE TRACY CHRISTOPHER: -- you can't  
3 apply it to every hearing that we hold, and I know when  
4 this rule was amended -- I can't remember, my court  
5 reporter was worried about it because I think there was  
6 something in the court reporter circle that said, you  
7 know, are we going to have to take down every hearing, and  
8 I just decided no, but I don't announce at my 9:00 o'clock  
9 hearing that my court reporter is not here. You know,  
10 people see that my court reporter isn't here, and they ask  
11 me for a court reporter if they want a record of that  
12 particular hearing. So if we're going to mess with this,  
13 we need to be thinking of hearings, too, and should there  
14 be a difference.

15 HONORABLE STEPHEN YELENOSKY: Well, and  
16 should they even have a right.

17 PROFESSOR DORSANEO: It says "proceeding."  
18 Right now it says "proceeding."

19 HONORABLE TRACY CHRISTOPHER: Right.

20 PROFESSOR DORSANEO: You know, I thought  
21 about saying "hearing or trial," but then you start  
22 saying, well, what's a trial, okay, and what's a hearing?

23 HONORABLE TRACY CHRISTOPHER: Right.

24 PROFESSOR DORSANEO: Every time we're here  
25 are we having a hearing or are we just having a meeting?

1 HONORABLE STEPHEN YELENOSKY: Well, are we  
2 saying now that they have a right to a record on an oral  
3 argument on a summary judgment?

4 PROFESSOR DORSANEO: That's what it says.

5 HONORABLE STEPHEN YELENOSKY: That will be a  
6 big change.

7 HONORABLE DAVID PEEPLES: I'd like to hear  
8 justification for that.

9 HONORABLE STEPHEN YELENOSKY: Yeah, because  
10 right now if somebody asks for record on summary judgment,  
11 I don't believe that they're entitled to it.

12 CHAIRMAN BABCOCK: Pete Schenkkan is going  
13 to tell you.

14 MR. SCHENKKAN: I don't mean to diminish the  
15 importance of this issue about what's covered by this  
16 rule, but I would like to go back to the focus we were  
17 having on bench conferences for a moment and suggest that  
18 maybe we're moving toward two alternative -- to a choice  
19 between two answers to Judge Yelenosky's question about  
20 what the default rule is, and one choice would be the one  
21 suggested, that unless waived by the parties it's on the  
22 record, including bench conferences; and the alternative  
23 is, as Alistair says, that with regard to bench  
24 conferences that these things are all on the record,  
25 comma, "including bench conferences if requested by a

1 party."

2                   So you put the burden on the party to say if  
3 I want the bench conference included within the  
4 proceedings in open court I have to ask for it, and I'm  
5 still listening to people as to which of these two, but is  
6 it -- we ought to go with, but is that really essentially  
7 the issue on the bench conferences? Are we going to say  
8 they're all on the record unless waived or are we going to  
9 say if you want the bench conference included in a  
10 proceeding that's going to be on the record you need to  
11 ask for it? Is that really the choice we're dealing with?

12                   CHAIRMAN BABCOCK: Right. Or to not have it  
13 at all in the rule. That would be another choice. Yeah,  
14 Justice Gaultney.

15                   HONORABLE DAVID GAULTNEY: I was looking at  
16 the current rule. It apparently handles the current  
17 situations. If a party wants or feels like they need to  
18 have a bench conference covered they'll ask for a record.  
19 Otherwise, they'll probably have an implicit agreement for  
20 it to be not on the record, but they have the right to the  
21 record under the current rule.

22                   Bill, I was wondering if we would satisfy  
23 your concern about a contemporaneous record requirement by  
24 simply adding the word "a full contemporaneous record"  
25 into the current rule. Why wouldn't that --

1           PROFESSOR DORSANEO: Well, it might, but I  
2 just want to get the idea across in some way that it's  
3 not -- it's not done by leaving the courtroom --

4           HONORABLE DAVID GAULTNEY: Right.

5           PROFESSOR DORSANEO: -- and picking up  
6 something that someone says is what you would have heard  
7 if you had been here.

8           HONORABLE DAVID GAULTNEY: And I think the  
9 problem that brought us here was 16.16 --

10          CHAIRMAN BABCOCK: Right.

11          HONORABLE DAVID GAULTNEY: -- saying you  
12 don't have to do that. So if the problem we're trying to  
13 fix is 16.16, I think we fix that. The current rule, if  
14 we need a change, could be improved by simply adding the  
15 word "contemporaneous."

16          PROFESSOR DORSANEO: But there still are  
17 other issues like the issue about the summary judgment  
18 thing. I mean, why -- what is the proceeding? You know,  
19 what is that talking about? If we're going to say  
20 "trials," do we say "trials only"? Should we say  
21 "hearings and trials" and maybe add the word "evidentiary  
22 hearings"?

23          HONORABLE STEPHEN YELENOSKY: Well,  
24 certainly evidentiary hearings.

25          CHAIRMAN BABCOCK: Richard Munzinger.

1                   HONORABLE DAVID GAULTNEY: The record of the  
2 summary judgment is not going to help you, so if "by  
3 agreement of the parties" is really what makes the rule  
4 work, if for some reason you think that you need a record  
5 of that hearing, the rule allows a party to make that  
6 record.

7                   CHAIRMAN BABCOCK: Richard.

8                   MR. MUNZINGER: The current rule says  
9 "proceedings in court." That's what the current rule  
10 says. An argument on a motion for summary judgment, an  
11 argument on a motion for continuance is a proceeding in  
12 court, and the current rule would require that the court  
13 reporter be there. I've read a number of appellate  
14 opinions where an appellate case can depend upon, in part  
15 at least, an admission made by counsel in oral argument on  
16 appeal before the court. They record the arguments  
17 generally, a lot of courts do, and we'll say, "Counsel in  
18 oral argument admitted X," and that forms a part of the  
19 logical syllogism that leads to the court's conclusion.  
20 It happens all the time. Why does that not apply to a  
21 motion for summary judgment?

22                   I don't think the debate is whether there is  
23 or isn't a right to a court reporter for a summary  
24 judgment. If a judge told me "I don't want my court  
25 reporter taking this argument down, Mr. Munzinger," I'd

1 have to make the tactical judgment as to whether I agree  
2 with the judge or don't, and I probably would say "Thank  
3 you, your Honor, I agree with you," with a smile on my  
4 face and argue my motion and hope that I survived the day,  
5 but the current rule says that a court reporter is to be  
6 present in court during the proceedings. And there's a  
7 reason for it. It's because people's rights are affected,  
8 and there should be a record of these things when people's  
9 rights are affected. That's what it's all about.

10 CHAIRMAN BABCOCK: Yeah, Tom.

11 MR. RINEY: This may be a stupid question,  
12 but why is Rule 13 in the appellate rules? I mean, if you  
13 look at appellate Rule 1.1 it says, "These rules govern  
14 procedure in appellate courts and before appellate judges  
15 and post-trial procedure in trial courts in criminal  
16 cases," and if you read along in these rules, 11, 12, and  
17 14, you could almost read this to say that court reporters  
18 are required in the appellate court. It doesn't say --

19 PROFESSOR DORSANEO: Well, the reason why a  
20 lot of rules are in these rules rather than in the trial  
21 rules is because the Court of Criminal Appeals did not  
22 have rule-making power except for appellate proceedings,  
23 and so we did the combined rules and we put them where we  
24 could put them so they would be within the rule-making  
25 power.

1           MR. RINEY: But if part of our policy in  
2 deciding this rule is to guide the trial court and to  
3 guide practitioners, we're wasting our time, because only  
4 the smartest appellate lawyers are going to know that to  
5 look for procedures in the trial court you go to the  
6 appellate rules.

7           CHAIRMAN BABCOCK: Judge Yelenosky.

8           HONORABLE STEPHEN YELENOSKY: Well, I think,  
9 I mean, in the ideal, yes, every word would always be  
10 taken down in the courtroom in every hearing, but we have  
11 to think about resources, and I think we've talked about  
12 summary judgments before, and they can be valuable. I've  
13 certainly heard from Justice Patterson and other court of  
14 appeal judges, it can be valuable to have a transcript of  
15 a summary judgment hearing, even if there's not a judicial  
16 admission, but being valuable has to be weighed against  
17 other considerations.

18           Every other week we have a nonjury week in  
19 Travis County, and probably 80 percent of my time I'm  
20 hearing summary judgments. There is no cost to the lawyer  
21 to ask for a record to be made. The cost to the system is  
22 that court reporter is taking down records all day long,  
23 most of which are never going to be used, and is not able  
24 then to work on what the court of appeals is waiting for  
25 in a trial transcript, so there's a trade-off there.



1           Now, since it's a rights issue, I can  
2 understand, well, there's no trade-off to be done, people  
3 are entitled to it, but what I said last time still seems  
4 true to me today, which is if in one, two, three percent  
5 of the time there is some kind of judicial admission made,  
6 whether summary judgment or otherwise, you're standing in  
7 front of the judge. Why can't the lawyer who wants that  
8 admission then ask the judge, "May I have that on the  
9 record" because you're devoting tons of resources to  
10 taking down references to case cites, to my endless  
11 questions of counsel about the cases, in order to get that  
12 one pearl that you're going to get, you know, and you  
13 could get anyway by simply asking for it.

14           CHAIRMAN BABCOCK: We need to take a vote,  
15 and I'm trying to formulate how to do it, and it seems to  
16 me we ought to take two votes. One ought to be whether we  
17 ought to leave bench conferences out altogether, and  
18 everybody in favor of that would vote one way, and  
19 everybody against it would vote another. If the people  
20 that say, no, we need to have it in in some fashion, then  
21 the vote would be Pete's suggestion of all bench  
22 conferences unless waived or the alternative to that would  
23 be only if requested, so kind of flip the burden around.

24           MR. SCHENKKAN: And just for clarification,  
25 your first proposed vote would be that bench conferences

1 as a category are not -- either are or are not to be  
2 included with proceedings in open court.

3 CHAIRMAN BABCOCK: Right. Right. But by  
4 putting it into this proposed rule. So, David, I know you  
5 wanted to say something.

6 MR. JACKSON: Just one quick -- the word  
7 "stenographically" in there could be a little ambiguous  
8 since there are three ways to make a record now in Texas.  
9 There are voice writers, stenographic writers, and tape  
10 recorders. I think if you lock it down to that one method  
11 you've made me very happy, but you might upset a few other  
12 people.

13 CHAIRMAN BABCOCK: Okay. So does that make  
14 sense to vote in that fashion on this issue of bench  
15 conferences?

16 HONORABLE LEVI BENTON: Would you restate  
17 it, please?

18 CHAIRMAN BABCOCK: Yeah. There would be two  
19 votes or potentially two votes. The first vote would be  
20 whether to leave out bench conferences altogether, and if  
21 that -- if that commanded a majority of our group then we  
22 wouldn't vote further, but if people said, no, we want to  
23 include bench conferences in some fashion, then we would  
24 vote on who preferred to have it all bench conferences  
25 unless waived or, alternatively, bench conferences, but

1 only if requested by the trial lawyer. Meadows' point  
2 there.

3 MR. MEADOWS: Well, I have a question about  
4 the vote. Is the reason we're having the vote because we  
5 think "during the proceedings" does not include -- would  
6 not encompass bench conferences?

7 CHAIRMAN BABCOCK: Yeah, that's how we got  
8 started down this road because Judge Christopher said --

9 HONORABLE TRACY CHRISTOPHER: "Open court,"  
10 actually.

11 CHAIRMAN BABCOCK: Huh?

12 HONORABLE TRACY CHRISTOPHER: "Open court"  
13 is the question.

14 MR. DAWSON: Yeah.

15 HONORABLE STEPHEN YELENOSKY: Well, and  
16 point of clarification then. On the first one, leave out  
17 bench conferences, is that intended -- if we vote "yes"  
18 for that, are we intending to be -- leave it agnostic or  
19 ambiguous for other people to figure out whether it  
20 includes bench conferences or not?

21 CHAIRMAN BABCOCK: I'm not sure "agnostic"  
22 is the right word, but --

23 HONORABLE STEPHEN YELENOSKY: Well,  
24 "agnostic" just means you're not committed to one or the  
25 other.

1 CHAIRMAN BABCOCK: Yeah, I think sort of  
2 that's more of a status quo-ey type of thing, like we  
3 wouldn't be commenting about what open court is going on.

4 HONORABLE STEPHEN YELENOSKY: But the status  
5 quo is obviously that people disagree about that, so to  
6 vote for that would be to vote for --

7 CHAIRMAN BABCOCK: Vote for chaos.

8 HONORABLE STEPHEN YELENOSKY: Vote for  
9 uncertainty.

10 PROFESSOR DORSANEO: That's a clear maybe.

11 HONORABLE STEPHEN YELENOSKY: Yes.

12 CHAIRMAN BABCOCK: Judge Christopher.

13 HONORABLE TRACY CHRISTOPHER: I agree with  
14 Judge Gaultney that we don't need a change and that it's  
15 absolutely my fault for bringing up bench conferences, and  
16 we have kind of an 80/20 rule in Harris County when before  
17 we make a rule change, we don't make a rule change unless  
18 there's a big clamor for a rule change, and unfortunately,  
19 I'm -- you know, I started this horrible discussion about  
20 bench conferences, and I think it's a little unfair to be  
21 making this decision without input from more judges,  
22 frankly.

23 PROFESSOR DORSANEO: Motion to table, huh?

24 HONORABLE STEPHEN YELENOSKY: Fair point.

25 HONORABLE DAVID PEEPLES: Is there going to

1 be a vote to whether to make any change at all, leave 13.1  
2 the way it is?

3 CHAIRMAN BABCOCK: I thought Justice  
4 Gaultney suggested that and I thought that made some  
5 sense, but --

6 HONORABLE DAVID PEEPLES: I didn't hear it  
7 in your description of what we're going to vote on,  
8 though.

9 CHAIRMAN BABCOCK: Well, we're not done  
10 voting.

11 HONORABLE DAVID PEEPLES: Wouldn't that make  
12 sense to do that first?

13 CHAIRMAN BABCOCK: I wondered about that.

14 HONORABLE JANE BLAND: I suggested it, and  
15 you promptly ignored me.

16 CHAIRMAN BABCOCK: I thought it was Justice  
17 Gaultney that suggested that.

18 HONORABLE JANE BLAND: No, I suggested a  
19 vote.

20 PROFESSOR DORSANEO: David, what about  
21 "contemporaneous verbatim record"?

22 CHAIRMAN BABCOCK: Well, we could do that,  
23 too. If we vote and say -- hang on, guys. If we vote and  
24 say that there's not -- we say no change to 13.1 then the  
25 question is whether the Court would have the benefit of

1 our feelings about these other issues, which we've just  
2 spent an hour talking about, or more, so we could do it  
3 any way you-all want. But I was intending, frankly,  
4 whoever suggested it, to have a vote on whether or not we  
5 ought to leave 13.1 alone. Yeah, Harvey.

6 HONORABLE HARVEY BROWN: I just wanted a  
7 question for clarification. Does anyone believe that 13.1  
8 is clear as to how we handle depositions right now so that  
9 the judges should be uniform on that across the state?  
10 Video depositions or even depositions where they read them  
11 into the record. I mean, I've had court reporters say,  
12 "Do I need to be here when it's read? You've given me  
13 page and line designations, I'd like to leave." Then they  
14 leave and then, of course, there's an objection  
15 anticipated.

16 CHAIRMAN BABCOCK: The worst thing that  
17 happens, and it happened to me once, was the court  
18 reporter did not leave. The court reporter was there.  
19 They were just resting their fingers while it was being  
20 played and then when we got --

21 HONORABLE HARVEY BROWN: So you thought it  
22 was being recorded.

23 CHAIRMAN BABCOCK: Then on appeal when we  
24 got this transcript it was like, you know, "Deposition  
25 read." Yeah, Justice Gaultney.

1                   HONORABLE DAVID GAULTNEY: I'd like to vote  
2 on not changing it, with one exception, having -- adding  
3 "contemporaneous verbatim record," I think is the language  
4 that Bill was talking about to it. And here's why. Even  
5 if we vote on the bench conference issue, an argument  
6 could be made that the first part of the rule, unless you  
7 expressly exclude bench conferences, covers everything  
8 that happens in the court. So unless you have an express  
9 exclusion that says "except bench conferences" then we've  
10 still got the same problem with the rule as it is, but I  
11 guess what I would get back to is making a suggestion that  
12 we first vote on whether we should change the rule only to  
13 reflect "a contemporaneous verbatim record" and then if  
14 someone feels like we need to get into some --

15                   CHAIRMAN BABCOCK: Well, if we're going to  
16 vote on whether to keep the rule as it is, let's vote on  
17 that, and then we can -- then we can do other things.  
18 Pete.

19                   MR. SCHENKKAN: I respectfully suggest just  
20 as a procedural matter, in a room full of lawyers and  
21 judges, that we not do that, that the thing we need to  
22 take up first is do we want bench conferences in or out,  
23 because if you just take a vote on leave the rule as it is  
24 you leave the question, which has been much discussed,  
25 what is the law on bench conferences; and given different

1 people's opinion as to what the law is, how effective are  
2 you in telling a particular district judge, "I'm sorry,  
3 Judge, that's the law," you know, insisting on my client's  
4 rights. So I think we ought to first vote on should bench  
5 conferences be in or out, and then, you know, if the  
6 decision is that bench conferences are in or bench  
7 conferences are out, we can take up the question of do we  
8 want to make any other changes or nonchanges.

9 CHAIRMAN BABCOCK: Yeah. Okay. Two more  
10 comments. Who wants to make them?

11 MR. MUNZINGER: I just want to point out one  
12 thing. The current rule does not have the language  
13 "conducted in open court" that the proposed amendment  
14 does.

15 CHAIRMAN BABCOCK: Right.

16 MR. MUNZINGER: And in part at least  
17 "conducted in open court" raises the ambiguity of the need  
18 for discussing bench conferences, even though it was a  
19 larger discussion later, but the current rule just simply  
20 says to make a record of all proceedings.

21 CHAIRMAN BABCOCK: It says "attend court  
22 sessions and make a full record of the proceedings."

23 MR. MUNZINGER: That's correct.

24 CHAIRMAN BABCOCK: Right.

25 MR. MUNZINGER: And it doesn't have the



1 limitation "conducted in open court."

2 CHAIRMAN BABCOCK: Right. Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, I don't  
4 know of any case law on bench conferences, but there is  
5 case law on records for summary judgments, and whatever  
6 the rule says, there's at least one court of appeals that  
7 says you're not entitled to a record on a summary judgment  
8 argument, so not just my opinion.

9 HONORABLE JAN PATTERSON: Well, it's not  
10 necessary. I don't know about entitled.

11 HONORABLE STEPHEN YELENOSKY: Not necessary.  
12 Well, not necessary in what sense?

13 CHAIRMAN BABCOCK: No, I think there's -- I  
14 think it's the Fort Worth court, right --

15 HONORABLE STEPHEN YELENOSKY: I don't  
16 remember, but --

17 CHAIRMAN BABCOCK: -- that said, yeah,  
18 you're not entitled to a record on summary judgment.

19 HONORABLE STEPHEN YELENOSKY: So for us to  
20 say, well, it doesn't exclude bench conferences --

21 MR. GILSTRAP: They say you're not entitled  
22 to a hearing.

23 PROFESSOR CARLSON: Right.

24 CHAIRMAN BABCOCK: Yeah. That's right.  
25 That was the main holding of that case.

1 All right. The Chair's prerogative. The  
2 first thing we're going to vote on, and I know everybody  
3 won't agree on this, but the first thing we'll vote on is  
4 whether or not to recommend to the Court any changes at  
5 all in 13.1.

6 MR. GILSTRAP: Are we going to vote for  
7 change?

8 CHAIRMAN BABCOCK: So this is a change vote.

9 HONORABLE STEPHEN YELENOSKY: Sounds like  
10 whoever we vote for we would be voting for change.

11 MR. WADE: Can we vote present?

12 CHAIRMAN BABCOCK: That would be breaking  
13 precedent in this committee, but I understand it's done in  
14 other deliberative bodies. So everybody that is in favor  
15 of keeping 13.1 exactly as it is, raise your hand. Let me  
16 try one more time. Okay. Good that I did that.

17 All people who are in favor of change? All  
18 people voting present? Okay, pretty close vote. 15 for  
19 leaving as it is, 12 for changing the rule.

20 So now we're going to take a vote on the --  
21 kind of the two-step vote. Everybody that thinks bench  
22 conferences ought to be included in the Dorsaneo-proposed  
23 rule that has the open court language in it, everybody  
24 that thinks we should include bench conferences in the  
25 Dorsaneo-proposed rules, raise your hand.

1 MR. MEADOWS: But okay so --

2 HONORABLE TRACY CHRISTOPHER: Is the default  
3 they have to be recorded?

4 MR. MEADOWS: So you want the no change  
5 people to vote here?

6 CHAIRMAN BABCOCK: Huh?

7 HONORABLE STEPHEN YELENOSKY: Yes.

8 CHAIRMAN BABCOCK: Everybody that thinks  
9 bench conferences should be included.

10 HONORABLE STEPHEN YELENOSKY: Assuming  
11 you're stuck with a new rule.

12 CHAIRMAN BABCOCK: Okay. All those opposed?  
13 Okay. That carries by a vote of 20 to 6.

14 Now, how many people think that if bench  
15 conferences are going to be included, it should be either  
16 all unless waived or only if requested. So everybody  
17 that's in favor of all bench conferences unless waived,  
18 raise your hand.

19 How many people think it should be only if  
20 requested? Okay. That's a fairly decisive vote. 19 for  
21 only if requested, 7 for all unless waived.

22 PROFESSOR DORSANEO: Am I supposed to be  
23 keeping track of this here?

24 MR. JACKSON: Dee Dee is.

25 HONORABLE STEPHEN YELENOSKY: We're making a

1 record.

2 CHAIRMAN BABCOCK: The court reporter is  
3 getting all of this down. So we now have -- we now have  
4 that. By those series of votes, Bill, do we -- or,  
5 everybody, do we cure the issue of open court?

6 HONORABLE HARVEY BROWN: What about the  
7 issue about depositions?

8 HONORABLE TRACY CHRISTOPHER: Yeah, we  
9 haven't cured the audiovisual recording question.

10 CHAIRMAN BABCOCK: I know. But I thought  
11 open courts was more related to what we have just been  
12 talking about than --

13 HONORABLE HARVEY BROWN: Okay, sorry.

14 CHAIRMAN BABCOCK: So, Bill, have we solved  
15 the problem of open court by including bench conferences?

16 PROFESSOR DORSANEO: I don't understand the  
17 question.

18 CHAIRMAN BABCOCK: Okay. Richard Munzinger  
19 said there's lots of stuff that doesn't happen in open  
20 court that affects the substantive rights of the parties.  
21 Bench conferences would be one thing, in chambers  
22 proceedings would be another.

23 PROFESSOR DORSANEO: Oh, see, in my mind,  
24 open court means in the courtroom. It doesn't mean in the  
25 chambers.

1 MR. MUNZINGER: I agree with that, but I  
2 raised the question in interpreting the language "in open  
3 court" is it in open court when it's at the bench and only  
4 three people hear it, the judge and the two lawyers. The  
5 jury didn't hear it, the parties didn't hear it, the  
6 spectators didn't hear it.

7 CHAIRMAN BABCOCK: Well, you solve that if  
8 you include bench conferences.

9 MR. MUNZINGER: I agree with that. I agree  
10 with that.

11 CHAIRMAN BABCOCK: All right. So you're  
12 okay with that.

13 MR. MUNZINGER: Yeah.

14 CHAIRMAN BABCOCK: Anybody not okay with  
15 that? Okay. Now, Judge Christopher says that are we  
16 going to require audio and audiovisual recordings played  
17 in court to be transcribed?

18 MR. GILSTRAP: Well, then there's a  
19 two-stage there, and there was a distinction between  
20 testimony and other kinds of recordings.

21 CHAIRMAN BABCOCK: Right. And, Judge  
22 Christopher, how would you solve this problem?

23 HONORABLE TRACY CHRISTOPHER: Well, my  
24 default rule would be the court reporter takes down every  
25 kind of audio recording unless the parties say it's too

1 garbled to actually transcribe and we just make it an  
2 exhibit.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE STEPHEN YELENOSKY: Or can they  
5 just agree that even though it's not garbled?

6 HONORABLE TRACY CHRISTOPHER: Or they can  
7 just agree.

8 HONORABLE STEPHEN YELENOSKY: If they can  
9 provide a transcript.

10 CHAIRMAN BABCOCK: Well, the language that  
11 has been proposed would be "any audio," comma,  
12 "audiovisual recordings played in court" would capture  
13 what you just said, wouldn't it? It would be distressing  
14 to Jackson, but that language would capture what you just  
15 said, right?

16 HONORABLE TRACY CHRISTOPHER: Oh, because we  
17 have "unless excused by agreement of the parties"?

18 CHAIRMAN BABCOCK: Right. Yeah, Bobby.

19 MR. MEADOWS: There seem to be two issues  
20 here. One is the issue of what gets put down that happens  
21 in the courtroom and this other one that I continue to  
22 struggle with a little bit, and that is what happens, for  
23 example, at the bench versus in chambers. If we drop "in  
24 the proceedings" in favor of "open court" and that means  
25 what -- to some what they've said in this discussion, that

1 bench conferences would be part of the open court  
2 proceedings but chambers would not, I disagree with that.

3 I want to be able to ask for the court  
4 reporter to take down what happens in chambers if it's  
5 being conducted in connection with the proceedings, and if  
6 we lose that in favor of open court and that has -- that  
7 changes the definition of my rights, I'm concerned about  
8 that.

9 CHAIRMAN BABCOCK: Okay. I think what I  
10 heard Richard Munzinger say was that this would not limit  
11 your right to request a --

12 MR. MEADOWS: See, I heard him say something  
13 differently. I heard him say -- and I'm not quarreling.  
14 I'm just saying "open court" is the operative language now  
15 instead of "proceedings," and what happens in chambers is  
16 not in open court, that I may not have the right to call  
17 for a court reporter to take down what's going on in  
18 chambers, you know, ten feet from the bench.

19 HONORABLE STEPHEN YELENOSKY: That's right.  
20 I agree with you, you should be.

21 CHAIRMAN BABCOCK: Well, the current rule --  
22 that's probably right, but the current rule says "court  
23 sessions."

24 HONORABLE TRACY CHRISTOPHER: That wouldn't  
25 be in chambers.

1 CHAIRMAN BABCOCK: You think that would not  
2 be in chambers?

3 HONORABLE TRACY CHRISTOPHER: I don't think  
4 so.

5 CHAIRMAN BABCOCK: I don't think the current  
6 rule --

7 MR. GILSTRAP: Let's vote on chambers.

8 MR. MUNZINGER: You know, in my experience  
9 if a judge has a conference in chambers and there's no  
10 record, if he makes a substantive ruling, I come out, if  
11 it's affected me I have an obligation to make a statement  
12 on the record.

13 CHAIRMAN BABCOCK: Right.

14 MR. MUNZINGER: "Your Honor, you have ruled  
15 in chambers," or say to him in chambers, "Are you going to  
16 rule that way on the record, your Honor, because if you  
17 aren't I need to make a point about it for my appeal."

18 CHAIRMAN BABCOCK: Right.

19 MR. MUNZINGER: And I've done that, and I've  
20 had that happen to me, and I don't know if we can write a  
21 rule that envisions all these things. The current rule,  
22 if we don't change it, fine. If we start setting out  
23 circumstances in a new rule then we need to be careful,  
24 and if I recall the genesis of this discussion about court  
25 reporters, it came about because of the perceived practice



1 of court reporters of not recording verbatim some of these  
2 things because of the essential impossibility of doing so  
3 with accuracy.

4 MR. JACKSON: Yeah.

5 MR. MUNZINGER: And that was where this  
6 discussion came from, and really I think his point is the  
7 court reporter is going to say "inaudible," "inaudible,"  
8 "inaudible," "inaudible," "yes," "no," "inaudible,"  
9 "inaudible," because they can't certify to the  
10 authenticity of what they're -- and the completeness of  
11 what they're attempting to record and be honest in their  
12 effort.

13 MR. MEADOWS: That's track one of this  
14 discussion. Track two is Judge Christopher's --

15 HONORABLE TRACY CHRISTOPHER: I take it  
16 back.

17 CHAIRMAN BABCOCK: She never meant to say  
18 it. Justice Bland.

19 HONORABLE JANE BLAND: I voted for the bench  
20 conference rule because I don't think that lawyers can  
21 always see if a court reporter is not typing, but I don't  
22 think that the same problem exists with chambers  
23 discussions. You know if you go in chambers and there's  
24 not a court reporter tagging along with a court reporting  
25 machine that what's being said is not being recorded, so I

1 think you're on notice that it's not being recorded.

2 HONORABLE STEPHEN YELENOSKY: But Bobby's  
3 point is you don't have a right to it, and he needs a  
4 right.

5 HONORABLE JANE BLAND: But you always have  
6 the right, as I think Richard pointed out, if something  
7 has happened in chambers that you want to make a record  
8 about you can --

9 MR. MEADOWS: Bystander's bill.

10 HONORABLE STEPHEN YELENOSKY: But you want  
11 to have a right of a verbatim transcript of what goes on  
12 in chambers, right, Bobby?

13 MR. MEADOWS: There's some -- I mean, it's  
14 happened to all of us. We're having a dispute and the  
15 judge decides, well, rather than having the jury leave,  
16 why don't we just go in chambers. Open the door, goes in  
17 there, and you deal with the problem, and if I want the  
18 court reporter to come along, I will say, you know, "I  
19 would like this on the record."

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE JANE BLAND: Right. Right.

22 CHAIRMAN BABCOCK: And the court usually  
23 grants it.

24 MR. MEADOWS: But what if some, you know,  
25 really good lawyer says, "Well, you don't have the -- this

1 is not happening in open court. You don't have the right  
2 to ask for it."

3 CHAIRMAN BABCOCK: Here's what I thought I  
4 heard Judge Christopher saying about that, was that  
5 whether you have a right or not, 13.1 as currently written  
6 doesn't give you that right.

7 PROFESSOR DORSANEO: Who knows what it  
8 means.

9 MR. MEADOWS: I think I could argue it the  
10 other way.

11 CHAIRMAN BABCOCK: Okay. Yeah, Frank.  
12 Yeah, because you're a lawyer.

13 MR. GILSTRAP: Why don't we leave 13.01 as  
14 it -- like it is in this respect, but then put another  
15 provision that says that, you know, you only have a right  
16 to a court reporter for bench conferences, discussions in  
17 chambers, and nonevidentiary hearings -- nonevidentiary  
18 hearing if you ask for it. In other words, the default  
19 position for those is you've got to ask for it. The  
20 default position for everything else is you're entitled --  
21 you know, the court reporter's got to be there, and maybe  
22 that we could sort them out that way.

23 CHAIRMAN BABCOCK: Okay. Justice Bland.

24 HONORABLE JANE BLAND: I've already been  
25 accused of drinking the appellate Kool-Aid and

1 micromanaging these things, and I feel like if we start  
2 going down to chambers discussions I'm guilty of it,  
3 because if that's where we're leading with this I want to  
4 just go back to the default rule, because I just don't  
5 think you can micromanage people's days, trial judges'  
6 days, to the extent that they have to figure out whether  
7 or not they have to drag a court reporter into their  
8 office if they want to have an informal charge conference.  
9 So --

10 CHAIRMAN BABCOCK: Would it help if we took  
11 the word "open" out? Bobby, would that help if we took  
12 the word "open" out, just "conducted in court"?

13 PROFESSOR DORSANEO: More agnosticism.

14 CHAIRMAN BABCOCK: Huh? Oh, sorry about  
15 that. I don't want to be accused of that.

16 MR. MEADOWS: I mean, my point in all of  
17 this is, understand, I want these things to occur  
18 spontaneously without court reporters. Almost all the  
19 time I think that's in the interest of the litigants and  
20 the lawyers in particular, but I just want to make sure  
21 that I have the right to do it, if it's a big deal that  
22 I've got a problem with the judge or problem with the  
23 record.

24 CHAIRMAN BABCOCK: Okay. Let's --

25 MR. MEADOWS: So that's why I want -- I'm

1 all right with the agreement language or waiver language,  
2 something that gives the lawyer the right to just not call  
3 for it, but the right to do so if it's needed.

4 CHAIRMAN BABCOCK: Let's talk real quickly  
5 about this "audio," comma, "audiovisual recordings played  
6 in court." Are we okay with that language or not?

7 MR. MEADOWS: This means you take it down  
8 when it happens?

9 CHAIRMAN BABCOCK: Yeah.

10 MR. MEADOWS: Best you can.

11 CHAIRMAN BABCOCK: And, David, we're going  
12 to get to the transcript issue in a minute.

13 MR. GILSTRAP: You're including the 911  
14 phone call in that?

15 CHAIRMAN BABCOCK: I would include that,  
16 yes. Okay. Are we okay with that or not?

17 MR. GILSTRAP: I'm not.

18 CHAIRMAN BABCOCK: Okay. You're not. Why?

19 MR. GILSTRAP: Because I don't think that  
20 the court reporter can get it down, and I think it's kind  
21 of an aspirational goal to get that down, to get any kind  
22 of accurate recording of that. It's different with  
23 deposition testimony. It's different with an audiovisual  
24 deposition. I can see having a court reporter there and  
25 get it all down verbatim, but he's not going to get the

1 911 recording down.

2 CHAIRMAN BABCOCK: Okay. So you're in favor  
3 of limiting it to audiovisual, basically, deposition --  
4 deposition.

5 MR. GILSTRAP: Testimony.

6 HONORABLE STEPHEN YELENOSKY: But if he  
7 doesn't get it down then the court reporter can -- often  
8 puts down "unintelligible."

9 MR. JACKSON: No. In 40 years I have never  
10 put "inaudible" or "indiscernible" --

11 HONORABLE STEPHEN YELENOSKY: Well, you have  
12 great ears.

13 MR. JACKSON: -- in a transcript. I've  
14 never done it.

15 HONORABLE STEPHEN YELENOSKY: Yeah.

16 MR. JACKSON: And that's the issue, you  
17 know, and that's not to say I have been perfect, but I  
18 have been willing to guess at the word to sign my name to  
19 that certificate and certify that as a true and correct  
20 transcript. The tape recorder, the tape recording issues  
21 that we're going to talk about, won't let me do that,  
22 because if I miss one word it messes up two or three other  
23 words, the whole sentence doesn't make any sense, and then  
24 I'm signing something and swearing to something that the  
25 Court Reporters Certification Board is going to then take

1 my license for, and best-you-can doesn't get there.

2 CHAIRMAN BABCOCK: David, you haven't --  
3 have you been a court reporter in state court?

4 MR. JACKSON: No, not an official. I have  
5 taken in state court, though, and, you know, the issue  
6 that you had earlier, we do a lot of work in state court  
7 because lawyers call us at the last minute and say, "We  
8 need a court reporter in so-and-so's associate judge's  
9 court right now."

10 CHAIRMAN BABCOCK: Well, you were a court  
11 reporter in Federal court for a long time, so --

12 MR. JACKSON: Yes.

13 CHAIRMAN BABCOCK: And surely there were  
14 tape recordings played. Whether state or Federal, what  
15 did you do when the FBI undercover tape was played in  
16 court? I mean, did you just quit typing or what did you  
17 do?

18 MR. JACKSON: I never had one. I mean, I  
19 don't ever remember that happening.

20 CHAIRMAN BABCOCK: No crime in Dallas.

21 MR. JACKSON: Now, I have had taped  
22 depositions, but, remember, I have been a court reporter  
23 before tape, before video, so for 40 years, but I didn't  
24 have that in Judge Taylor's court.

25 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

1 HONORABLE DAVID GAULTNEY: I think one  
2 problem with the audiotapes that are not video depositions  
3 is for an appellate court to figure out what portion was  
4 played so that even though the transcription may not be  
5 exact and we've got the full video, we can watch it, do we  
6 know where it started, and if there's no record at all of  
7 what happened in court, just "video played" then, you  
8 know --

9 CHAIRMAN BABCOCK: Well, that was the  
10 problem that happened in my case, because the exhibit was  
11 in the record, but it was also quite clear from the record  
12 that the judge had made a ruling excluding portions of it,  
13 but not all of it, and then the issue became, well, was  
14 what was played to the jury what the judge permitted or  
15 not. And there had been no objection at the time by the  
16 opponent of the testimony that what was played to the jury  
17 was inaccurate or not in accordance with the judge's  
18 rulings.

19 HONORABLE DAVID GAULTNEY: And 16.16  
20 currently allows that audio not to be recorded, as I  
21 understand it, so what if an objection needs to be made  
22 and the court reporter is not in the room? So I think  
23 there's some advantage to the court reporter -- to  
24 requiring even the nonvideo deposition recordings for the  
25 court reporter to be there and to record proceedings.



1                   CHAIRMAN BABCOCK: Okay. So here's what I  
2 think the vote needs to be, but correct me if I'm wrong.  
3 We'll vote on the language, Bill's language, that says as  
4 amended audio -- "any audio," comma, "audiovisual  
5 recordings played in court," which would not, Frank, be  
6 limited just to testimony.

7                   MR. GILSTRAP: Right.

8                   CHAIRMAN BABCOCK: So if you're in the  
9 Gilstrap/Jackson school, you're going to vote against  
10 this. But everybody who's in favor of this rule saying  
11 "any audio," comma, "audiovisual recordings played in  
12 court," raise your hand.

13                   All those opposed? The vote was 19 to 6 in  
14 favor of including that language. Frank -- I mean  
15 Richard.

16                   MR. MUNZINGER: Is it possible or does  
17 anybody think it is advisable to impose an obligation on  
18 counsel who plays a portion of a videotaped deposition,  
19 for example, or a tape recording -- not a tape recording,  
20 but to give to the court for the appellate record  
21 references that allows the court reporter and the  
22 appellate court to determine that which was played? If I  
23 take a videotaped deposition, for example, it gives me the  
24 time of the day, and there are references on my videotape  
25 that I can with precision state, because you have to do it

1 in Federal court in El Paso, at least the Western  
2 District. If you're going to play the deposition you've  
3 got to give the judge the reference of both page, line,  
4 and video reference, impose that obligation on counsel to  
5 assist the court reporters and the appellate courts for  
6 their records.

7                   CHAIRMAN BABCOCK: Well, that's where we're  
8 headed next, and of course, that's easy with depositions  
9 because you get page and line. That's easy. It's the 911  
10 tape or the nontranscribed tape recordings that's the  
11 problem. Bobby.

12                   MR. MEADOWS: I guess I'm struggling with  
13 what I see is a very clear difference that -- which may be  
14 just my problem. The reason I think the court reporter  
15 should take down everything that happens by way of  
16 testimony, that is testimony that's offered, you know, in  
17 the case, before the jury, by way of deposition is that's  
18 testimony coming before them just as it was happening on  
19 the witness stand. That needs to be taken down realtime.

20                   If the jury is hearing something else, the  
21 911 tape, they're hearing it because it's been admitted  
22 into evidence for some reason. It's -- you know, it's  
23 some kind of tape recording that's met some kind of  
24 evidentiary rule that's allowed it into evidence, and so  
25 it's in the record itself as an exhibit. So I don't --

1 that to me doesn't really need to be copied down by the  
2 court reporter, because it's a thing in itself, and it's  
3 part of the record, so I don't get the difference.

4           The jury shouldn't be hearing it unless it's  
5 evidence by way of sworn testimony or a tape or some other  
6 item of evidence that they watch and listen to that's been  
7 admitted by the court, which is in the record.

8           CHAIRMAN BABCOCK: Yeah, and the problem is  
9 when the tape that the jury hears is not in the record.

10           MR. MEADOWS: Well, why wouldn't it be there  
11 unless some lawyer messed up?

12           CHAIRMAN BABCOCK: Well, it's not in there  
13 because some lawyer messed up. That doesn't mean the jury  
14 didn't hear it.

15           HONORABLE STEPHEN YELENOSKY: No, but  
16 was error preserved?

17           CHAIRMAN BABCOCK: Huh? It's error  
18 preservation is the problem.

19           HONORABLE STEPHEN YELENOSKY: Right.

20           MR. MEADOWS: Right. But to me we shouldn't  
21 be trying to fix that problem. We should just be  
22 examining what happens when the whole thing works in the  
23 appropriate way, and that is someone wants the jury to  
24 hear the 911 tape, they offer it, the judge allows it,  
25 they hear it, it's got an exhibit number on it, and it's

1 part of the record. The court reporter does not need to  
2 take that down.

3 CHAIRMAN BABCOCK: Bill.

4 PROFESSOR DORSANEO: And I just wanted to  
5 say that once you start talking about exhibits then you  
6 move from 13.1(a) to 13.1(b). That's why it doesn't say  
7 anything about --

8 MR. MEADOWS: But the rest of this is just  
9 the natural sequence of a trial where you offer testimony  
10 by some method other than a witness present in the  
11 courtroom, and if someone has not -- has accomplished that  
12 by way of a video or audio and no record allowed by the  
13 rules, that's just part of what we're dealing with because  
14 we allowed it to control cost, and, you know, let parties  
15 obtain evidence in ways other than, you know,  
16 stenographically or bringing the witness to court, and  
17 that's just the way the evidence is brought forward, and  
18 the court reporter has to do the best they can.

19 CHAIRMAN BABCOCK: Yeah, Harvey.

20 HONORABLE HARVEY BROWN: I just want to  
21 remind everybody of Judge Christopher's earlier comment  
22 that sometimes the tape recording is used in questioning a  
23 witness, and then is it testimony or is it an exhibit, and  
24 the last trial I was in in April a witness denied  
25 something happened in a meeting. They pulled out the

1 tape, played about a minute of it. The whole tape was  
2 already in evidence, but this one minute thing got  
3 highlighted for the next ten minutes, and if you didn't  
4 have that one minute being typed up, you'd have a problem.

5 MR. MEADOWS: But that tape's in evidence.  
6 So somehow one of the parties then needs to have the  
7 record reflect what that -- what's being used with that  
8 witness.

9 HONORABLE HARVEY BROWN: Right, but the only  
10 way to do that is for the court reporter to type up that  
11 portion of the tape that's being played.

12 MR. MEADOWS: But, Harvey, if there's a  
13 hundred-page document that's admitted into evidence and I  
14 want to question a witness about it, I put the document up  
15 and say, "Just read this," and then I ask him questions  
16 about it, and I haven't identified the page, I haven't  
17 identified the paragraph. I don't see the difference.

18 CHAIRMAN BABCOCK: Yeah, Justice Bland.

19 HONORABLE JANE BLAND: What about getting  
20 16.16 off the books? How do we do that? Is that part of  
21 our bailiwick, or is that the court reporters? Because to  
22 me that's the real problem.

23 CHAIRMAN BABCOCK: Yeah, right.

24 HONORABLE JANE BLAND: That's what's created  
25 some of the confusion, and we need to somehow get that

1 excised.

2 CHAIRMAN BABCOCK: That's where I'm headed  
3 next.

4 HONORABLE JANE BLAND: Oh, okay.

5 CHAIRMAN BABCOCK: Because if the Court were  
6 to adopt 13.1(a) as amended in line with our votes then  
7 that quite clearly would conflict with 16.16 and  
8 particularly as proposed here, and so that needs to be  
9 harmonized, and frankly, I think based on somebody's  
10 comment it probably needs to be taken out of 16.16 and put  
11 into the rules if we're going to impose duties on lawyers  
12 to assist the court reporters, like Richard Munzinger  
13 said. Don't you think?

14 HONORABLE JANE BLAND: Well, I would be in  
15 favor of abolishing. I don't know if we have that  
16 authority or the Court does, or, you know, I don't know  
17 who came up with the manual, and it just seems like 16.16  
18 -- even if the rule were not amended, even if TRAP 13.1  
19 were not amended, 16.16 is in conflict with it.

20 CHAIRMAN BABCOCK: Yeah, the Supreme Court  
21 approved the manual, so I guess they can unapprove it if  
22 they want to. And it seems to me regardless of how the  
23 language is written that the central issue is whether or  
24 not the court reporters are to be provided transcripts of  
25 these audio recordings because they need it in order to

1 complete their job properly and measured against Judge  
2 Peeples' comment that that is way too burdensome on the  
3 parties. It's fairly easy when you're talking about  
4 videotaped depositions because there's almost always a  
5 transcript of that that's easy to -- not always, but  
6 almost always. Never, according to Judge Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, no, you  
8 just -- you try big cases. Okay. In little cases --

9 CHAIRMAN BABCOCK: No, I try little cases,  
10 too.

11 HONORABLE TRACY CHRISTOPHER: -- people save  
12 money by just putting a tape recorder down for the  
13 deposition.

14 CHAIRMAN BABCOCK: Okay. All right. So  
15 then maybe it's a bigger problem than I think, but in any  
16 event, how do we balance these two competing issues or  
17 interests that are expressed by David Jackson on one side  
18 and Judge Peeples on the other.

19 CHAIRMAN BABCOCK: David.

20 MR. JACKSON: Well, you know, I have been on  
21 this committee back when those rules were changed, and we  
22 debated those issues, and one of the big discussions we  
23 had back then was that, okay, we'll go ahead and allow  
24 people to use tape recorders and take discovery that way  
25 to save money, but, you know, we debated for a long time

1 that we were going to require them to come to the  
2 courthouse with a transcript of that tape, and we even  
3 went -- one of our proposals was to have a certified court  
4 reporter transcribe the tape before it would be admissible  
5 in court, and now we've gotten away from that and gone  
6 full circle and just requiring the court reporter now to  
7 sit in the courtroom and listen to an audiotape and make a  
8 verbatim record, and that's just not fair to the court  
9 reporter.

10 CHAIRMAN BABCOCK: Yeah. And I think  
11 what you -- I sort of remember those discussions and sort  
12 of remember being on your side on that, but --

13 MR. JACKSON: We lost.

14 CHAIRMAN BABCOCK: But we lost that one.  
15 And that was before I was Chair and not voting, but  
16 testimony is one thing, and the -- as we've called it, the  
17 911 tapes is another and, you know, if we look back  
18 historically we might be able to say, hey, if you're going  
19 to use testimony and you want -- deposition testimony and  
20 you want the court reporter to transcribe that then you've  
21 got to provide a transcript, and maybe not for the 911  
22 tapes, I don't know, but, yeah, Bill.

23 PROFESSOR DORSANEO: I just want to point  
24 out that civil procedure Rule 203.6 is about use of  
25 nonstenographic recordings, and it has some sentences in



1 it that I have a little difficulty following clearly, but  
2 it's optional for the court to require a deposition  
3 transcript, stenographic one from a court reporter, and I  
4 wanted to ask the judges, normally that's not required,  
5 right? You don't require that? Huh?

6 HONORABLE TRACY CHRISTOPHER: No. They just  
7 play it. And, you know, they're usually 15-minute  
8 depositions of the cop.

9 PROFESSOR DORSANEO: You think that's pretty  
10 much customary across the -- across Harris County and  
11 maybe the state as a whole? I think what I'm getting at  
12 is I thought maybe this would be a place, 203.6, to say  
13 something to the trial lawyers rather than leaving it all  
14 back at 13.1. It would be a place where some of this  
15 information could be articulated.

16 CHAIRMAN BABCOCK: The central issue,  
17 though, I mean right now is whether or not we're going to  
18 recommend to the Court that the parties be required to  
19 provide transcripts to the court reporters of any audio or  
20 audiovisual recording that's going to be played in court.

21 Yeah, Carl.

22 MR. HAMILTON: Well, is the purpose for  
23 doing that only because the court reporter might not be  
24 able to understand what's said on the tape?

25 CHAIRMAN BABCOCK: David, yeah.

1 MR. JACKSON: It's to help us. You know, it  
2 will give us at least the opportunity to go over what  
3 we've done and make sure we haven't made just an  
4 egregious error.

5 MR. HAMILTON: Does that then suggest that  
6 the parties are going to have to agree on the accuracy of  
7 the transcript if it's hard to understand?

8 CHAIRMAN BABCOCK: Yeah. I think so. And I  
9 can see, you know -- I mean, there are a lot of tapes  
10 where one side or the other says, "Oh, he's saying 'yes'  
11 there" or "he's saying 'did'" and they're saying "No, it's  
12 'didn't,'" and they can't ever agree on that.

13 MR. HAMILTON: But if that's what the jury  
14 is hearing, why should we make the judgment of what the  
15 jury interprets by putting it in a transcript?

16 HONORABLE TRACY CHRISTOPHER: Right.

17 CHAIRMAN BABCOCK: Yeah. Bobby.

18 MR. MEADOWS: I think you just said this,  
19 but I'm concerned that this vote requires us to re-examine  
20 the question of whether or not we should allow parties to  
21 obtain testimony by way of audio depositions without  
22 stenographic record, which, you know, we've dealt with,  
23 the rules permit it, and most of us would never even --  
24 would never do that, but as Judge Christopher said, there  
25 are other cases in other -- where costs may matter, but I

1 just think this vote is making us look at whether or not  
2 we ought to allow that practice.

3 CHAIRMAN BABCOCK: Okay. Justice Bland.

4 HONORABLE JANE BLAND: I guess I don't see  
5 203.6 and our vote as being inconsistent because on the  
6 one hand we're basically commanding the court reporter to  
7 take everything down in the courtroom including audio  
8 recordings.

9 CHAIRMAN BABCOCK: Right.

10 HONORABLE JANE BLAND: And it seems like  
11 under 203.6 if there is a problem with a tape-recorded  
12 deposition, which is the testimony of a witness in a case,  
13 the trial judge has the latitude to order that a  
14 transcript be provided, which is -- I don't have a problem  
15 with that because there's protections in there, like they  
16 have to show good cause; and so in the circumstance where,  
17 you know, the judge wants to order that a transcript be  
18 provided, it gives the judge the opportunity to order  
19 that, but to -- if what we're now discussing is to require  
20 a transcript always be provided and not only just in the  
21 case of the recording of the deposition but also in the  
22 case of any recording, I've got more of a problem with  
23 that because I agree with Judge Peebles that that puts an  
24 incredible burden, particularly in family law cases, on  
25 the parties to get -- because it's not cheap to get these

1 things transcribed.

2 HONORABLE STEPHEN YELENOSKY: Don't we just  
3 want them to provide a transcript if it's stenographic?

4 HONORABLE JANE BLAND: And I'm not convinced  
5 that our court reporters in state court as of today, you  
6 know, can't take down anything that is audible enough to a  
7 jury, and if the jury can't hear it then, you know, it's  
8 probably unfair to import the transcript from some other  
9 place. So for those reasons I wouldn't include any  
10 requirement of a transcript, and I will say there are a  
11 lot of new things that court reporters have like realtime,  
12 where they can -- you know, and lawyers, too, where they  
13 can, you know, date -- you know, and in really big  
14 bet-the-company cases where this could be something the  
15 lawyers would want to argue about, they can get daily copy  
16 and look at it and see if there's a problem -- I think as  
17 Bobby was saying earlier, try to determine if there's a  
18 problem contemporaneously with the evidence as it's being  
19 presented instead of trying to decide it later when the  
20 court reporter is preparing the transcript.

21 CHAIRMAN BABCOCK: Judge Peeples.

22 HONORABLE DAVID PEEPLES: Two things. 203.6  
23 gives the court the authority for good cause shown to make  
24 it be written down, and, of course, you can ask for that  
25 if you want it. I urge us to think in terms of cost

1 benefit. Okay. Think about a hundred cases that are set  
2 for trial or hearing on a given date. How many of those  
3 are going to settle? 90 percent? Pick your number, but  
4 it's going to be a lot.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE DAVID PEEPLES: But if we mandate  
7 this we're saying in a hundred percent of those cases, all  
8 100, if you're going to be prepared for trial you've got  
9 to have your tape recorder deposition typed up, even  
10 though 90 or more percent of those are going to settle,  
11 and of the ones that go to trial a lot of them are little  
12 bitty. I have cases all the time where they don't even  
13 ask for a record, nonjury. Nobody wants a record. They  
14 know it's not going to be appealed, and so are we really  
15 going to say in all those cases, type it up, just to catch  
16 the one or two or three percent?

17 I just think -- I'm sympathetic to the  
18 problems of writing it down, but I think it's fine, and  
19 I've seen all kinds of records "unintelligible" or  
20 "phonetic," you know, and so forth. That's the best we  
21 can do, but the cost benefit analysis it seems to me is  
22 overwhelmingly to keep it the way it is, good cause.

23 CHAIRMAN BABCOCK: Tom.

24 MR. RINEY: We're talking about proposed  
25 revisions to Rule 16.16, right?

1                   CHAIRMAN BABCOCK: Well, yes. That's the  
2 rule that we're talking about that's in this manual, but  
3 we're debating the policy issue of transcripts versus not.

4                   MR. RINEY: Right. I think we need to  
5 figure out a way to put it in the Rules of Civil  
6 Procedure, because I never heard of this manual until I  
7 got the agenda the other day, and what I don't want is --  
8 I mean, I'll pay attention from now on; but I don't want  
9 to show up in the courtroom with a tape recording and  
10 nobody knows about this requirement, which is basically a  
11 duty on the lawyers, except the court reporter; and it's  
12 not in this book, at least that I can find.

13                   CHAIRMAN BABCOCK: Yeah, no, I think that's  
14 a fair point, and I think that if we vote for requiring  
15 the parties through their counsel to provide transcripts  
16 of audio or audio/video recordings then we're going to  
17 have to put that or at least recommend that that go into  
18 the rules.

19                   MR. RINEY: Then that's fine with me.

20                   HONORABLE STEPHEN YELENOSKY: Well, nobody  
21 has a problem with requiring them to provide a transcript  
22 if they already have it, right? So if it was  
23 stenographically recorded, can't we just require them to  
24 provide it in those instances? I mean, you're not making  
25 them do anything they haven't already done.

1 CHAIRMAN BABCOCK: Gene.

2 MR. STORIE: Well, I actually have had  
3 experience with this kind of problem, because unemployment  
4 benefit cases, the record is an original oral transcript  
5 of a telephone hearing, and so when you're going to court  
6 what I used to do is take my little portable tape  
7 recorder, queue up the tape to the good part, and be ready  
8 either to impeach or to offer the admission to the court,  
9 you know, maybe just a couple of minutes out of a one or  
10 two-hour tape. So I would certainly need that recorded.  
11 It would certainly be a waste of money to make a  
12 transcript ahead of time, and as long as that can be done,  
13 I would be happy with whatever we got.

14 CHAIRMAN BABCOCK: Okay. Let's vote on  
15 this. And here's the vote I propose: Everybody who is in  
16 favor of requiring transcripts to be provided for any  
17 audio or audiovisual recordings that are going to be  
18 played in court, you'll raise your hand.

19 MR. HAMILTON: Is this of testimony or of  
20 anything?

21 CHAIRMAN BABCOCK: It's not limited to  
22 testimony, no.

23 HONORABLE STEPHEN YELENOSKY: And is there a  
24 chance to say if they have a stenographic recording they  
25 provide it?

1 CHAIRMAN BABCOCK: Yeah, I think that can be  
2 another vote.

3 HONORABLE STEPHEN YELENOSKY: All right.

4 CHAIRMAN BABCOCK: But the first vote would  
5 be as the proposal in -- the proposed 16.16 would be if  
6 you're going to play an audio or audiovisual recording in  
7 court you've got to have a transcript that you give to the  
8 court reporter. Okay. So everybody in favor of that  
9 raise your hand.

10 MR. JEFFERSON: Is this going to modify  
11 203.6, too, or 203.6 --

12 CHAIRMAN BABCOCK: Yeah, we'll figure out  
13 where to put it, but everybody that's in favor of that,  
14 raise your hand.

15 MR. JACKSON: I've been the one vote before.

16 MR. BOYD: She's raising her hand, too.

17 CHAIRMAN BABCOCK: But we can't see her.  
18 Everybody opposed to that raise your hand.

19 That vote was 23 to 1, the Chair not voting,  
20 so nobody is in favor of doing that. All right. Now, the  
21 next vote I think we should take is Judge Yelenosky's  
22 proposal that the -- there ought to be a -- some direction  
23 that if a transcript is available that it should be  
24 provided to the court and court reporter. Yes, Judge  
25 Bland.



1 HONORABLE JANE BLAND: I think, again, we're  
2 getting to the point of micromanaging, because if there is  
3 a transcript, you know, the court reporter will ask and  
4 the lawyer will say, "Yeah, here's a transcript to help."  
5 I mean, to --

6 CHAIRMAN BABCOCK: So you would be against  
7 putting that in a rule.

8 HONORABLE STEPHEN YELENOSKY: That's fine.

9 MR. MUNZINGER: Transcript could be work  
10 product as well.

11 CHAIRMAN BABCOCK: That's true. It could  
12 be, so requiring -- so you would be a "no" on that one,  
13 too?

14 MR. MUNZINGER: Well, if it would help me.

15 HONORABLE STEPHEN YELENOSKY: I think you're  
16 right. I mean, it will happen anyway.

17 MR. JACKSON: They would use it as evidence  
18 in the Court Reporters Certification Board hearing to  
19 prove that the court reporter got it wrong.

20 CHAIRMAN BABCOCK: Justice Patterson.

21 HONORABLE JAN PATTERSON: Well, for the  
22 record and in honor of the court reporters, and maybe I  
23 was raised by court reporters well, but what's missing  
24 from this conversation is that we aren't creating records,  
25 and we should be making court reporters' lives easier in

1 order to provide the best record, and we were trained to  
2 provide transcripts, to provide spellings, to do whatever  
3 we had to do to contribute to the making of the record,  
4 regardless of whether there was an appeal. I mean, it's  
5 just the nature of lawyering, so I'm just kind of  
6 surprised by that we're having to rule-make on this, and  
7 I'm just not quite sure what exactly -- what the exact  
8 problem is we're addressing, but I -- we want to make the  
9 best records we can, and so I'm listening to David to try  
10 to understand so that we don't make mistakes in this area.

11 CHAIRMAN BABCOCK: Lonny.

12 PROFESSOR HOFFMAN: The existence of a  
13 transcript doesn't tell us the quality of it, so we still  
14 can't fix the problems about disagreements about the  
15 quality.

16 CHAIRMAN BABCOCK: Right.

17 PROFESSOR HOFFMAN: And it seems to me what  
18 we could do if we want to go down this road is save the  
19 court reporter's time, and we could give them a  
20 transcription of what we expect our witnesses are going to  
21 say on direct exam and just sort of avoid that problem as  
22 well.

23 HONORABLE STEPHEN YELENOSKY: Just do it all  
24 on submission.

25 CHAIRMAN BABCOCK: Or we could do it that

1 way. I'm trying to see if there is something that this  
2 committee would recommend to the Court that would address  
3 David's problem, and it sounds like there's not, but --

4 HONORABLE TRACY CHRISTOPHER: Well, perhaps  
5 you could require that the audiotape always be included as  
6 an exhibit.

7 MR. WADE: Yes.

8 HONORABLE TRACY CHRISTOPHER: So that we  
9 have sort of a backup.

10 CHAIRMAN BABCOCK: Yeah.

11 MR. GILSTRAP: Let me ask you, suppose you  
12 have testimony of the witness as the sole evidence on  
13 causation and you ask the witness, "Did the negligence  
14 cause the injury?" He says, "yes." You've got evidence  
15 of causation. If he says "no," you don't. Now, what if  
16 it says "unintelligible"? I don't think you've got any  
17 evidence of causation, and I think that's where we wind  
18 up.

19 CHAIRMAN BABCOCK: Yeah.

20 MR. GILSTRAP: "Unintelligible" is -- I  
21 mean, can you go behind there? I mean, how do you go  
22 behind there and challenge that?

23 HONORABLE STEPHEN YELENOSKY: Well, just  
24 like you would if the transcript said "no" and you thought  
25 it should say "yes."

1 MR. MUNZINGER: But if the tape recording  
2 itself were admitted into evidence the appellate court  
3 itself could listen to the tape and determine that the  
4 appellate court, pretty easy with the court reporter, it's  
5 inaudible, or they could say it isn't inaudible. Now, I  
6 don't know how they could -- I guess they could do that.  
7 They're affirming a fact finding in a trial court or a  
8 jury, but they certainly could if they listened to the  
9 tape. I can't imagine a responsible attorney allowing a  
10 tape to be played to a jury where the tape is not made an  
11 exhibit, unless it's my tape and I don't want it to be  
12 one.

13 CHAIRMAN BABCOCK: Yeah. Okay.

14 MR. MEADOWS: But ordinarily, just  
15 ordinarily that wouldn't -- if the tape is a substitute  
16 for a deposition, ordinarily it would not be admitted any  
17 more than the deposition itself would be admitted, because  
18 what -- the evidence is what's read to the jury, and so  
19 the deposition itself never comes into evidence. Now, it  
20 could be that because what we're dealing with is a fairly  
21 rare circumstance that's got a cost benefit analysis that  
22 runs the way Judge Peeples says it does, and these tapes,  
23 as Judge Christopher says, always are about 15 minutes  
24 then what we want to do is just say, "Okay, this is  
25 different than a stenographic record of a deposition

1 transcript and we're going to let it be a part of the  
2 record," and that would solve the problem.

3           But I don't think we want to -- again,  
4 looking at it from a different way, I don't think we want  
5 to have testimony come into the trial by way of having it  
6 read or shown to the jury on the video and then also admit  
7 the disk or the deposition transcript as well.

8           CHAIRMAN BABCOCK: Okay. I think -- and  
9 I'll be challenged by the people to my left if I'm wrong  
10 about this, but I think we've created a pretty full record  
11 for the Court on this issue, which who would have thought  
12 we could have talked about it all morning.

13           MR. MEADOWS: Well, it happened because it  
14 looked like we might finish early.

15           HONORABLE STEPHEN YELENOSKY: Anybody who's  
16 been here over the last year --

17           CHAIRMAN BABCOCK: I'm sorry, Bobby. What  
18 did you say?

19           MR. MEADOWS: I said, well, this all  
20 happened because it looked like we might finish early a  
21 couple of hours ago.

22           CHAIRMAN BABCOCK: That's right, and  
23 everybody was scared, which leads me to another logistical  
24 problem that we have. I foolishly told Judge Yelenosky  
25 that I thought we could get into our PJC amendment, Rule

1 226a before --

2 HONORABLE STEPHEN YELENOSKY: Well, I'm more  
3 responsible than most for us not getting there.

4 CHAIRMAN BABCOCK: Yeah, that's true. So  
5 you would have to --

6 HONORABLE STEPHEN YELENOSKY: Yeah, so I've  
7 waived it.

8 CHAIRMAN BABCOCK: Should we try to eat  
9 right now and then get into it? But I know you're the  
10 duty judge today, so what's the --

11 HONORABLE STEPHEN YELENOSKY: Well, you  
12 know, yeah, I think everybody wants to eat. We'll just  
13 have to see what happens. I've got to go at 1:30, and  
14 I'll come back when I can after I'm done with whatever  
15 TROs I have.

16 CHAIRMAN BABCOCK: Can we do this? Usually  
17 we take an hour, but in deference to Judge Yelenosky could  
18 we try to eat in 45 minutes?

19 HONORABLE JAN PATTERSON: Don't we also have  
20 the OCA people here for the civil/criminal?

21 CHAIRMAN BABCOCK: We possibly do, but  
22 that's the last agenda item, so --

23 HONORABLE STEPHEN YELENOSKY: Well, you can  
24 switch, I mean, if you want to do it later. I'll be gone  
25 between 1:30 and probably 3:00.

1 CHAIRMAN BABCOCK: Let's try to break right  
2 now for 45 minutes, so we'll be back at -- well, that  
3 won't get us back until 1:20.

4 HONORABLE STEPHEN YELENOSKY: Right.

5 MR. MUNZINGER: Do it in 30 minutes, Chip.  
6 We can eat in half an hour.

7 CHAIRMAN BABCOCK: We're in recess. Off the  
8 record.

9 (Recess from 12:36 p.m. to 1:24 p.m.)

10 CHAIRMAN BABCOCK: Let's go back on the  
11 record, although this will be a bench conference. Judge  
12 Yelenosky had to go back to court because he's the duty  
13 judge here today, and he will not be back until about 3:00  
14 or 3:30. He's very interested in 226a, which is our next  
15 agenda item, but -- and we have people here who I think  
16 want to talk about the classification of appellate cases  
17 as civil or criminal, and they might like to get out of  
18 here. I guess, Alex and Judge Christopher, would you-all  
19 mind moving your topic behind the classification of  
20 appellate cases?

21 HONORABLE TRACY CHRISTOPHER: I don't care.

22 CHAIRMAN BABCOCK: Okay with you, Alex?

23 PROFESSOR ALBRIGHT: I defer to Judge  
24 Christopher.

25 HONORABLE TRACY CHRISTOPHER: Chair's

1 prerogative.

2                   CHAIRMAN BABCOCK: All right. Well then,  
3 Justice Gaultney, could you take us through this  
4 classification issue?

5                   HONORABLE DAVID GAULTNEY: Okay. What I'm  
6 going to start with is the June 7, 2008, memo to the SCAC  
7 committee members, and the proposal is on page four of  
8 that, right in the middle of that memo. Essentially, the  
9 Council of Chief Justices asked that we consider whether  
10 or not the rules could be amended to provide additional  
11 guidance on how cases when they are filed in the court of  
12 appeals are designated by the clerk as either CR or CV.  
13 Rule 12.2(a)(4) currently provides that a criminal -- a CR  
14 will be put on every criminal case and CV on civil case.

15                   Now, there's a multipage memo from Jody  
16 which -- and the problem is that there are conflicts in  
17 the courts of appeals on how cases are designated either  
18 CR or CV when they're filed. This has a couple of  
19 impacts. One, generally fees are charged in civil cases  
20 and not in criminal. The retention time in terms of the  
21 clerks saving records are affected by whether it's a  
22 designated civil or criminal case, and then finally,  
23 generally where you go after -- it may be some indication  
24 to a party as to what the next step of the appellate  
25 process is. Criminal go to the Court of Criminal Appeals,



1 civil to the Texas Supreme Court.

2           So our committee looked at this. Jody's  
3 memo, if you've read it, is very detailed and goes through  
4 a lot of the issues involved in how cases get designated  
5 CR or CV. I think really the essential discrepancy that  
6 has developed in the courts is what approach is best used;  
7 that is, do you look at what type a case has historically  
8 been considered. So, for example, an original proceeding,  
9 a mandamus proceeding, some court might say traditionally  
10 a mandamus or a writ is a civil matter, so we're going to  
11 give it a CV. Now, that's even though it's in a criminal  
12 law matter and might go and would go -- the next step  
13 would be to the Court of Criminal Appeals where that might  
14 be considered. That's one reason, I think, for the  
15 differences in approach. Another is there are some types  
16 of cases where even though it's going to end up in the  
17 Court of Criminal Appeals, it's given a CV docket number  
18 in the trial court, bail forfeiture, something of that  
19 nature.

20           Another way of looking at it is, okay, where  
21 is this case going to go, not where did it come from, not  
22 what has it traditionally been considered, but where is  
23 this going to end up, which of the two higher courts is  
24 going to have jurisdiction to consider this matter? And  
25 that's really the approach of the proposal, and it's in

1 the middle of page four, and that is that instead of  
2 looking at the traditional nature of the proceeding, a  
3 mandamus being a civil proceeding or something of that  
4 nature, and instead of looking at what particular court it  
5 came from, the clerk should be thinking in terms of where  
6 the case is going next in all likelihood, and so that the  
7 proposal is on the middle of page four. I can read it,  
8 but it's there.

9           Essentially there are a couple of things  
10 about the proposal I wanted to point out. One is that the  
11 two high courts don't always -- they may have jurisdiction  
12 over an issue, but choose historically not to exercise  
13 that jurisdiction in deference to the other court that  
14 traditionally has handled that type of issue, so the  
15 proposal uses the language "designates it CV for causes  
16 over which the Supreme Court exercises jurisdiction."  
17 Now, that language as opposed to "has jurisdiction," okay,  
18 so there might be a situation where the Supreme Court  
19 would have jurisdiction, say, to issue a mandamus or some  
20 other issue, but chooses not to in deference to the Court  
21 of Criminal Appeals jurisdiction. So that's one thing I  
22 wanted to point out.

23           The other is, is that the including phrase,  
24 "including appeals related to civil cases and original  
25 proceedings in civil law matters," that's probably an

1 all-inclusive description of what would be a CV case, but  
2 we feel like that the first clause is really the guidance  
3 that is needed in terms of here's where you look. You  
4 look to where this case would end up. I think that's  
5 essentially all I wanted to say.

6           The choice of the word "causes" as opposed  
7 to "a case," really what the proposal is, is this is the  
8 type of case, so CV is designated for a type of case over  
9 which the Supreme Court exercises jurisdiction rather than  
10 a case. This rule is a -- is not intended to -- it's not  
11 a substantive rule. It's not intended to determine that a  
12 case has jurisdiction. All this is doing is simply trying  
13 to provide the clerk with a viewpoint on how to designate  
14 cases CV or CR for purposes of docketing within the court  
15 of appeals, for purposes of fees, for purposes of  
16 retention time, for all of these things in the hope of  
17 creating more uniformity among the courts in how they are  
18 treated.

19           CHAIRMAN BABCOCK: Okay. This seems -- this  
20 sounds simple, but we'll see. Bill.

21           PROFESSOR DORSANEO: Well, I'm going to  
22 start out by saying that I know very little about criminal  
23 law, only the criminal law that I've had to read because  
24 it directly applied to someone I know.

25           CHAIRMAN BABCOCK: We don't need to get into

1 your criminal problems, Bill.

2 MR. ORSINGER: Don't put any more on the  
3 record.

4 PROFESSOR DORSANEO: But Jody's memo is a  
5 difficult read for me, and I kind of got out of it the  
6 idea that if something is identified as criminal rather  
7 than civil the case might get dismissed in the court of  
8 appeals because the rules of jurisdiction are considerably  
9 more restrictive in criminal litigation than in civil  
10 litigation, and this inmate trust account kinds of cases,  
11 now, maybe that's been resolved by the Court of Criminal  
12 Appeals. What happens is that in some courts that  
13 classify these as criminal the case gets dismissed because  
14 there's no statute authorizing the exercise of the court  
15 of appeals' appellate jurisdiction, and this clarification  
16 doesn't really solve any of those problems, right?

17 HONORABLE DAVID GAULTNEY: Right.

18 PROFESSOR DORSANEO: It just says good luck  
19 on figuring out when the court of appeals exercises  
20 jurisdiction and when the Supreme Court exercises  
21 jurisdiction.

22 HONORABLE DAVID GAULTNEY: Well, I think  
23 that point's well-taken in the sense of this. This is not  
24 intended -- there are a group of cases where the clerks  
25 are going to know what is the type -- the large majority

1 of cases are going to be where the clerks know where the  
2 case is going next. That's not really the issue from  
3 their standpoint in deciding whether to do CR or CV. It's  
4 whether they're going to look at that or whether they're  
5 going to look at where it came from or whether they're  
6 going to look at the nature of it.

7           Now, there is a group of cases, you're  
8 right, where that issue is unresolved. In other words,  
9 the Court of Criminal Appeals hasn't decided whether it's  
10 going to be a criminal law matter or the Supreme Court  
11 hasn't decided whether it's going to exercise  
12 jurisdiction. There is a small group of cases like that,  
13 and -- but this rule is not intended to really address  
14 that. That's a substantive problem that involves whether  
15 it's a criminal law matter or a civil law matter for  
16 purposes of deciding what rules are going to be applied,  
17 for example, the mandamus standard, for example, things of  
18 that nature. But all this rule is really intended to do  
19 is give guidance in terms of the consideration to be  
20 applied by the clerk, and in most cases there are that  
21 issue has -- in many cases I would say that issue is not  
22 in dispute. So it's something they will know.

23           PROFESSOR DORSANEO: So they will know  
24 whether the Court of Criminal Appeals exercises  
25 jurisdiction in most cases, but perhaps not in inmate

1 trust fund cases.

2 HONORABLE DAVID GAULTNEY: Inmate trust fund  
3 may be an example of a case where that law is still  
4 developing. So let me just give you an example on page  
5 three, okay. The bail forfeiture proceedings, all right,  
6 there's a statute that says the trial court treats it as  
7 a -- on its civil docket. Well, the Court of Criminal  
8 Appeals considers that a criminal law matter, and they're  
9 going to exercise jurisdiction over that. So when that  
10 goes to -- and as I said, 22.10 doesn't change that fact,  
11 so the clerk on the court of appeals knows that. They  
12 know that the Court of Criminal Appeals is where that case  
13 is going, but they also have the statute. So what -- do  
14 they look at where it came from and how the trial court  
15 treated it, or do they look at where it's going to in  
16 terms of deciding CR or CV? That's all this proposal is  
17 intended to provide guidance on.

18 PROFESSOR DORSANEO: But it's regardless of  
19 what the -- how it was labeled in the court below.

20 HONORABLE DAVID GAULTNEY: Essentially.

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: What is the effect of the  
23 designation? Suppose it's wrong.

24 HONORABLE DAVID GAULTNEY: Well, that  
25 problem exists currently. Now, it's heightened perhaps by

1 this proposed, admitted, but I can give you an example.  
2 There was an insanity acquittee case, okay, that one court  
3 gave a CR designation to. It came out of a criminal  
4 district court who retained jurisdiction over that, and  
5 the acquittee, every year he would come up for it. Well,  
6 in fact, the Supreme Court has jurisdiction over that  
7 issue, insanity acquittees, whether their civil commitment  
8 will continue for another year. So if that person looks  
9 at that CR designation we've given, a couple of things  
10 might be suggested, one of which is I should file a  
11 petition in the Court of Criminal Appeals. That's under  
12 the current rule.

13           Now, this rule at least would suggest to the  
14 appellate clerk, don't consider that it came from a  
15 district -- a criminal district court, consider where it's  
16 going to; that is, it's going to go to the Supreme Court,  
17 and so it would suggest that that should be given a CV  
18 designation; and, in fact, it is now. I think all the  
19 courts do that. They give those types of cases CV  
20 designations, but this rule is in part dealing with that  
21 type of issue.

22           Now, the question is what if it's wrong?  
23 Again, what if it's wrong currently? So there is a  
24 related concern, and that is on the last page, and we  
25 considered this outside our task and more in the scope of

1 Professor Dorsaneo's committee, but that is, you know,  
2 should there be some appellate rule that deals with the  
3 situation where some -- where a CR case is incorrectly  
4 designated a CV and relied on by the party. I don't think  
5 it should be, but let's say there is. Should there be  
6 some type of provision for transfer? Now, we didn't come  
7 up with a proposal for that. We considered that outside  
8 our assignment, because the CR/CV designation currently  
9 exists. Okay.

10           The only question is do you -- what guidance  
11 can be given to the clerks as to how to decide which one  
12 to give it, CR or CV, and our view was that it should be  
13 where it's going to, not where it came from and not what  
14 it has traditionally been considered.

15           CHAIRMAN BABCOCK: Okay. Justice Hecht.

16           HONORABLE NATHAN HECHT: Just on that last  
17 page, the practice of the Court since I have been there  
18 has been if we get a filing that we think belongs at the  
19 Court of Criminal Appeals, we send it over there, and I  
20 think they treat it as having been filed there when it was  
21 filed with us, and we get quite a few, so it happens  
22 probably a couple of times a month that we send stuff over  
23 there, and I think they would do the same for us, but I  
24 don't recall it ever happening that it was filed in the  
25 wrong court. By the same token, we get stuff filed in our



1 court that's addressed to the Fifth Circuit or some  
2 Federal court, and we just send that back, so that's been  
3 our practice.

4 HONORABLE DAVID GAULTNEY: Yes, sir.

5 CHAIRMAN BABCOCK: Jeff, do you have  
6 something?

7 MR. BOYD: Well, my question was if the rule  
8 currently says the clerk is supposed to designate it CV  
9 for civil or CR for criminal, and the problem with that is  
10 that for some kinds of cases it's unclear to the clerks,  
11 the courts haven't yet clarified which is which, which  
12 category it falls in, how does this proposed solution  
13 solve the problem when that same problem still exists for  
14 some kinds of cases the courts haven't clarified -- so if  
15 it's inmate trust litigation, in Waco are they still going  
16 to call that what is civil --

17 PROFESSOR DORSANEO: Criminal.

18 MR. BOYD: -- and over Justice Gray's  
19 objection and in all the other courts they'll call it  
20 criminal?

21 HONORABLE DAVID GAULTNEY: Well, that is  
22 what I was trying to talk about just a minute ago. That  
23 is a problem. It's a problem today. It's a problem in  
24 the next -- there is a group of cases where what type of  
25 case it is hasn't been decided, and so, yes, this rule

1 doesn't really provide a whole lot of guidance for that.  
2 What I'm suggesting is, is that that's a small group of  
3 cases, and that a great majority that's not the issue.  
4 The issue is simply is that the appropriate way to  
5 consider whether to designate it CR or CV, where it's  
6 going, or is it more appropriate to think in terms of  
7 where it came from or what is the traditional nature of  
8 the remedy that's being sought. Has it traditionally  
9 historically been considered a civil remedy when, in fact,  
10 is it a criminal law matter, and so what the rule  
11 essentially does is say, well, we can't deal with the  
12 situation that's undecided, that the Court of Criminal  
13 Appeals hasn't decided whether it has jurisdiction under  
14 the Constitution for inmate trust or whatever it is. That  
15 group of cases, really this rule doesn't help you, but the  
16 current rule doesn't help you either, so that's going to  
17 have to be developed on a common law basis.

18           The -- now, one thing we could do, which I  
19 don't propose doing, is trying to list cases. I think the  
20 problem with that is it's an evolving -- it would be an  
21 evolving list, perhaps. Secondly, I'm not sure it would  
22 be all-inclusive. We did attempt to make a list of cases  
23 that have been unresolved, and it was a long list. I'm  
24 not even sure it was all-inclusive. So that's the problem  
25 with a list, and really, I think all we're trying to do is

1 give guidance in the rule.

2 MR. BOYD: To follow up, I guess then what  
3 I'm trying to figure out is what does this -- what kinds  
4 of situations does this proposal provide help in. Are  
5 there situations where in the trial courts they're always  
6 marked as civil and the general nature of the remedy is  
7 typically considered civil, but when it gets to the highest  
8 court of the state it's always going to go to the Court of  
9 Criminal Appeals? Are those inconsistencies out there  
10 regularly?

11 HONORABLE DAVID GAULTNEY: Let me give you  
12 two examples. Okay. One is let's say you have a mandamus  
13 in a criminal law matter, and mandamus get filed in the  
14 court of appeals. As Jody's memo points out,  
15 traditionally those have been given CVs.

16 MR. BOYD: In the court of appeals.

17 HONORABLE DAVID GAULTNEY: In the court of  
18 appeals. It's an original proceeding. Now, there are  
19 some courts that give it CRs, because since it's in a  
20 criminal law matter, the next process, whatever it is, is  
21 going to be in the Court of Criminal Appeals. Now, the  
22 Supreme Court may have mandamus jurisdiction over that  
23 issue, but chooses not to exercise it in a criminal law  
24 matter. Okay.

25 So what the rule says is don't look at the

1 fact that the mandamuses have traditionally been  
2 considered a CV. Okay. Look at which court exercises  
3 jurisdiction, which higher court exercises jurisdiction  
4 over that issue. In other words, if it's the Court of  
5 Criminal Appeals, give it a CR; Supreme Court, give it a  
6 CV. Another example is the one on page three, which is  
7 the bail forfeiture thing. Again, that comes from -- the  
8 trial court is required by statute to put it on a civil  
9 docket, but the Court of Criminal Appeals has held that  
10 it's a criminal matter and that statute doesn't change the  
11 nature of the proceeding.

12           What this proposal says, don't look at the  
13 CV designation in the trial court. Look at the fact that  
14 the Court of Criminal Appeals is going to take this case,  
15 not the Supreme Court, in deciding whether to -- in the  
16 court of appeals, simply make a docket entry of CR or CV.

17           CHAIRMAN BABCOCK: Bill, then Harvey.

18           PROFESSOR DORSANEO: Now, I'm going to sound  
19 like you with my 13.1 for a second now. Why does it say  
20 "including" in both of these little paragraphs?  
21 "Including appeals related to civil cases," you know, and  
22 the next one, "including appeals related to criminal  
23 cases," et cetera? What does that add that I'm not  
24 catching?

25           HONORABLE DAVID GAULTNEY: Right.

1                   PROFESSOR DORSANEO:  And wouldn't it be  
2 better to say what you just said the difference is,  
3 regardless of how the case was designated in the trial  
4 court?

5                   HONORABLE DAVID GAULTNEY:  Right.  The  
6 current -- the current provision just says "criminal case"  
7 or "civil case," okay, so the question we were asked was  
8 what additional guidance can we give.  Now, actually that  
9 "including" clause probably covers everything that might  
10 be filed in the court.  The first clause, though, is what  
11 we felt like would give guidance, but the "including," it  
12 specifically designates appeals related to criminal cases  
13 and "related to" picks up language from a Court of  
14 Criminal Appeals opinion, and "proceedings in criminal law  
15 matters" -- actually, "original proceedings" is not  
16 specifically referenced in the current designation, so  
17 that adds some --

18                   PROFESSOR DORSANEO:  I see.

19                   HONORABLE DAVID GAULTNEY:  -- to the fact  
20 that you're supposed to look at original proceedings, too,  
21 when you're designating something as criminal or civil.  
22 "In criminal law matters," and that picks up the  
23 constitutional limitation of the Court of Criminal Appeals  
24 for mandamus, but --

25                   PROFESSOR DORSANEO:  You don't think it's

1 necessary to put that "regardless" kind of thought in  
2 there, that that's plain on the face of the first part of  
3 it?

4 HONORABLE DAVID GAULTNEY: "Regardless"?

5 PROFESSOR DORSANEO: "Regardless of how the  
6 case was designated in the court below."

7 HONORABLE DAVID GAULTNEY: I don't think  
8 it -- I think by pointing them in the direction of the  
9 higher courts you do that, and I think it's simply a  
10 difference in approach, not that they don't understand  
11 where it's going and not that they don't understand where  
12 it's coming from or not that they don't understand what it  
13 traditionally has been. It's just a choice that courts  
14 have made over the years of saying, well, this has  
15 traditionally been a civil proceeding, we'll give it a CV  
16 even though we know it's going to -- the next step is  
17 going to be the Court of Criminal Appeals.

18 PROFESSOR DORSANEO: Then the next thing,  
19 Jody's memo, March 3rd, 2008, says -- or as I read it it  
20 says that the big problem area is inmate trust fund  
21 litigation and that that might be resolved soon by the  
22 Court of Criminal Appeals. I don't know if it's been  
23 resolved by the Court of Criminal Appeals or not. Does  
24 anybody know?

25 MR. REYNOLDS: It was argued, but it has not

1 been resolved.

2 HONORABLE JAN PATTERSON: It was argued in  
3 the spring.

4 HONORABLE DAVID GAULTNEY: But for that type  
5 of fix --

6 CHAIRMAN BABCOCK: Harvey.

7 HONORABLE HARVEY BROWN: I was wondering if  
8 this is going to make the job of the clerk of the court of  
9 appeals easier or harder. More specifically, do the  
10 clerks know when a matter is going to go to the Court of  
11 Criminal Appeals versus the Texas Supreme Court? I mean,  
12 is that something that they're taught and educated and  
13 they'll know that, or is that something that they're going  
14 to need additional training and supervision on?

15 HONORABLE DAVID GAULTNEY: Well, I think --

16 HONORABLE HARVEY BROWN: I mean, like you  
17 said you tried to put together a list. If you were  
18 struggling in putting together a list, it struck me that  
19 maybe the clerks might struggle, too.

20 HONORABLE DAVID GAULTNEY: Well, I think  
21 that struggle occurs currently, but I think that they have  
22 access to the chief staff attorney, and that's generally  
23 -- the chief staff attorney I suspect may have some input  
24 in terms of if they have a question, but all I can tell  
25 you -- and I think it may depend on the experience of

1 the -- it will depend on the experience of the clerk  
2 certainly, but, I mean, if they know -- if they've been  
3 there a long time certainly they're going to understand  
4 which cases end up which places in all likelihood.

5 I can tell you that when I prepared this I  
6 did consult with our clerk, and she didn't seem to think  
7 it was a problem with implementation. I mean, I really do  
8 think it's not -- the issues that are -- the issues that  
9 have been raised in terms of, well, what about the inmate  
10 trust fund litigation, that deals with a separate issue;  
11 that is, the issue hadn't been resolved and certainly the  
12 clerk's not going to know where that's going to end up.  
13 Certainly that's a problem, but that's a problem today  
14 with that clerk trying to designate a CR or CV. That's --  
15 that's going to have to be resolved by the higher courts.

16 CHAIRMAN BABCOCK: Jeff and then Carl and  
17 then Frank.

18 MR. BOYD: If you ask the question where is  
19 this case going to ultimately end up, what are the  
20 standards that answer that question? I mean, what do the  
21 Supreme Court and the Court of Criminal Appeals apply?  
22 What standards do they apply to answer that question on  
23 any given day?

24 HONORABLE DAVID GAULTNEY: Well, I mean,  
25 again, I would say that -- I would ask that we not try to



1 make too much of this rule because that issue is a  
2 difficult issue that, in the inmate trust litigation, a  
3 court may struggle with. What is the limit of the Court  
4 of Criminal Appeals' jurisdiction? I mean, they struggle  
5 with it in terms of this bail forfeiture statute. They  
6 struggle with it in terms of the extent of their -- maybe  
7 their other jurisdiction orders exactly what -- for  
8 example, the DNA testing statute. They had to resolve  
9 whether or not that was within their jurisdiction.

10           So there are going to be cases that -- or  
11 causes, like the DNA testing, that are created by statute  
12 that we may not immediately know the answer to, and  
13 certainly this rule doesn't pretend, at least hopefully,  
14 to suggest that a substantive ruling is being made. All  
15 this rule is doing is simply saying hopefully how should  
16 the -- what consideration should be given by the clerk in  
17 deciding whether to give something a CR designation as  
18 opposed to a CV.

19           CHAIRMAN BABCOCK: Carl.

20           MR. HAMILTON: I agree with the last comment  
21 that clerks are going to have some difficulty in figuring  
22 out what to put on here. It may be a dumb question, but  
23 if this committee can't define what a criminal case is  
24 then we've got a problem. Why can't we just define what a  
25 criminal case is and everything else is civil?

1 HONORABLE DAVID GAULTNEY: I wish it were  
2 that easy, but the memo points out that that question may  
3 be evolving. You know, it --

4 MR. HAMILTON: I know it's been argued back  
5 and forth between some of the courts as to what it is, but  
6 if the Court sets a rule and says "A criminal case is one  
7 brought by the state that seeks a criminal conviction" or  
8 some such thing, then that's the definition. Anything  
9 else is civil.

10 HONORABLE DAVID GAULTNEY: Well, for  
11 example, then the DNA, the Court of Criminal Appeals chose  
12 not to -- I mean, that was not a case involving -- I mean,  
13 the conviction had already occurred. This is  
14 post-conviction DNA testing.

15 MR. HAMILTON: Well, the rule might have to  
16 include anything related to the original case.

17 CHAIRMAN BABCOCK: Justice Hecht.

18 HONORABLE NATHAN HECHT: Well, I mean, the  
19 rules can only do so much, and we can't affect people's  
20 substantive rights without repealing statutes, and we  
21 can't -- probably can't define the jurisdiction of our  
22 court versus the Court of Criminal Appeals because it's  
23 going to be a constitutional matter that I wonder if -- I  
24 just wonder if you could do it by rule. Even if the two  
25 courts agreed, which they might, I still wonder if you

1 could do it by rule.

2 CHAIRMAN BABCOCK: Yeah, as opposed to an  
3 adversary proceeding that everybody that has a stake in it  
4 gets the chance to say something.

5 HONORABLE NATHAN HECHT: Right.

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: Well, what I'm hearing then  
8 in all these problem areas, inmate trust fund litigation,  
9 forfeitures, habeas corpus, the Court apparently does not  
10 have the power to decide where those cases go by passing a  
11 rule. It only can -- the courts can only resolve that by  
12 interpreting their jurisdictional statutes, and that's got  
13 to go through the whole procedure of litigation in the  
14 appellate courts. So we can't really do anything about  
15 the substance of Jody's memo today. The Court can't do  
16 anything about it.

17 All we can do then is find some kind of --  
18 some logical way to name -- to label a case CV or CR.  
19 When inmate trust fund litigation is finally resolved the  
20 clerks will know whether it's CV or CR, and the only  
21 consequence of that is -- has to do with fees and  
22 retention of the files. That's it, right?

23 HONORABLE DAVID GAULTNEY: Well, that might  
24 be a consequence in terms of how the appellate court  
25 handles it within their system, but there also is the

1 suggestion, I think, to -- I mean, if you just designate  
2 everything CV, you know, without some standard it might  
3 suggest to someone that the case is not, in fact, a  
4 criminal case, so that would be an unintended effect.

5 MR. GILSTRAP: Well, what would be the  
6 effect? I mean, you just got it wrong and they collected  
7 the fees and they shouldn't have or something like that.  
8 That's it?

9 HONORABLE DAVID GAULTNEY: Well, the example  
10 I gave of the inmate -- I mean, the acquittee who files  
11 his PDR in the Court of Criminal Appeals instead of the  
12 Supreme Court.

13 MR. GILSTRAP: And then it goes to the wrong  
14 court and maybe that court says, "Too bad," you know,  
15 "Wrong court. Your case is over."

16 HONORABLE DAVID GAULTNEY: So the issue is  
17 if the law is clear, if the law is absolutely clear that  
18 that case belongs in the Supreme Court, despite the fact  
19 that it comes out of a criminal district court that looks  
20 at that civil commitment every year, do we want to give  
21 that a CR or a CV?

22 CHAIRMAN BABCOCK: Jeff, did you have your  
23 hand up? And then Justice Bland.

24 MR. BOYD: Oh, did you call on me? I'm  
25 sorry, I was talking.

1                   CHAIRMAN BABCOCK: Yeah, because you had  
2 your hand up.

3                   MR. BOYD: I was murmuring over here to the  
4 judge. What if the rule were changed and you just got rid  
5 of subsection (4), and the courts of appeals gave it  
6 neither? How would that impact the parties or the courts?

7                   HONORABLE DAVID GAULTNEY: Well, as Frank  
8 said, there is an impact by statute, is the fees charged  
9 in civil cases. So that's one practical aspect that the  
10 clerk, once they make a designation "This is a civil  
11 case," they're going to charge a fee for it. Okay. It  
12 does affect retention. I think it's a six-year file  
13 retention, if the -- once the court of appeals designates  
14 it and sets it up as a civil case in terms of how long  
15 they're going to retain the file after it's closed. It's  
16 six years for civil cases. If it's a criminal case, it  
17 depends on the term of the sentence, 25 years or less, a  
18 certain period of time; longer than that, a different  
19 period of time, or permanent.

20                   CHAIRMAN BABCOCK: Justice Bland.

21                   HONORABLE JANE BLAND: Well, it just seems  
22 to me like this is a good idea because it will give  
23 everybody a rule to look at for designating cases, and I  
24 don't think, you know, we can decide in the gray areas  
25 whether they're supposed to go to one or the other, but

1 here for the vast majority of cases we have the  
2 designation. I think most courts operate under this rule  
3 already, but if they don't, now they will. And I think  
4 it's important that we retain the civil and criminal  
5 designation in the cause number because that's used in a  
6 whole lot of ways for routing cases to the right people to  
7 work on them, for pulling statistical information, you  
8 know, about how many civil opinions are done versus how  
9 many criminal and all kinds of information and for keeping  
10 the records and even for signing opinions.

11           So I don't think getting rid of the  
12 designation is a good idea, and it doesn't seem like we're  
13 affecting anybody's substantive rights here by just  
14 basically saying if it goes to one court, use this cause  
15 number, and if it goes to the other, use the other; and if  
16 it turns out that the designation has been in error then  
17 we probably should have some mechanism for redesignating,  
18 just like when we have to, you know, redesignate the  
19 plaintiff and the defendant or redesignate a cause number  
20 that's the wrong number or, you know, I don't -- you know,  
21 it seems like there would be -- and if that means putting  
22 in some sort of transfer mechanism in the rule, which it  
23 sounds like the courts already do as a matter of practice,  
24 that's probably a good idea, too.

25           CHAIRMAN BABCOCK: Yeah, it looks like we

1 solicited help from the clerks, from the various clerks,  
2 and got some good feedback. Have we run this proposed  
3 solution by them and by the chief judges who asked for  
4 this clarification?

5 HONORABLE DAVID GAULTNEY: I did not. I  
6 was -- I thought I would bring it here first and if you  
7 wanted me to do that I would be glad to do that.

8 CHAIRMAN BABCOCK: Yeah. Lonny.

9 PROFESSOR HOFFMAN: Just a couple of  
10 additions. So, I mean, there is this informal mechanism,  
11 you know, we've heard about. It sounds like it happens  
12 not infrequently. The other thing, and I think this is a  
13 point Jeff was making much earlier, that it sounds like in  
14 most of the time we don't have a problem. So -- so I  
15 guess my impression from reading the memoranda and  
16 listening to the conversation is -- is that we're dealing  
17 with the small category of cases in which the law is  
18 unsettled, and so sort of reasonable clerks and reasonable  
19 lawyers can differ as to where it's going to begin with.

20 So it doesn't seem like we're going to ever  
21 come up with a designation that can address that  
22 ambiguity, certainly not in the abstract here, so unless  
23 I'm missing something, my sense is the system sort of  
24 works the way it does now adequately, and in the few cases  
25 when a case ends up in the wrong place, the two courts of

1 last resort at least in theory have a way to shuttle them  
2 back and forth between one another. And so I'm sort of  
3 left with the feeling that let's leave well enough alone  
4 and call it a day.

5 HONORABLE DAVID GAULTNEY: Okay, well, the  
6 question came from the Council of Chief Justices to us if  
7 we could provide additional clarification on how we  
8 thought the rule should operate, and the reason is, is  
9 that there is conflicts, not in the area where  
10 jurisdiction has not been decided, but in areas where  
11 jurisdiction has been decided. So that's really what the  
12 rule is designed to deal with, is provide guidance in  
13 areas where jurisdiction --

14 PROFESSOR HOFFMAN: So, again, I'm sorry,  
15 I'm with you, but here's what I'm not following. We see  
16 that there is some ambiguity sometimes in places where the  
17 law is unsettled, and as you say, though, but apparently  
18 also inconsistency even in circumstances when the law is  
19 more settled, and yet different people are coming up with  
20 different designations, but what's the source for that?  
21 In other words, is that because one clerk's office has a  
22 preference for one way versus another?

23 We may not know the answer. There may be  
24 multiple explanations for it, but the question is can we  
25 come up with something better? In fact, I think that's



1 exactly what sort of your -- what you looked at; and I'm  
2 just saying I'm left with the impression that we cannot,  
3 that we'll create more bugaboos unexpectedly or perhaps  
4 even ones that we expect will happen; and again, I'm sort  
5 of left with the sense that most of the time it works  
6 fine; and when it doesn't, there's this informal  
7 transferring mechanism that seems to take care of it.

8                   CHAIRMAN BABCOCK: Well, isn't the feature  
9 -- I mean, isn't what they've added here in addressing the  
10 Council of Chief Justices' problems that they are to be  
11 forward-looking and not looking down to the trial court,  
12 so however it was designated there doesn't really count.  
13 You should be forward-looking, and that is some guidance  
14 and advice to the clerks of the courts of appeals.

15                   HONORABLE JAN PATTERSON: It's a small step,  
16 but it's a significant one, and it gives information --

17                   CHAIRMAN BABCOCK: One small step for  
18 clarity.

19                   HONORABLE JAN PATTERSON: It's sort of a  
20 Potter Stewart know-it-when-you-see-it where is it headed;  
21 and that adds some information to the clerks, and also the  
22 great benefit has been for them to ventilate this issue so  
23 that there is a movement together on some of these issues  
24 where it wasn't discussed before, I get the sense. So now  
25 there's been some communication, but it's added this

1 further conversation about forward-looking as opposed to  
2 backward-looking.

3 CHAIRMAN BABCOCK: Yeah, Richard Orsinger.

4 MR. ORSINGER: My view is if the Council of  
5 the Chief Justices think enough about this problem to ask  
6 for help, that we ought to give them help; and I don't  
7 think that we're qualified or even capable of defining  
8 what is criminal jurisdiction and what is civil  
9 jurisdiction; and what our opinion is isn't determinative  
10 anyway; and if we pass a rule that states our opinion on  
11 that, then a decision by the Supreme Court or the Court of  
12 Criminal Appeals is going to make the rule partly  
13 inaccurate.

14 And let me ask this, Judge Gaultney. If we  
15 did this, would it eliminate some of the existing  
16 disparities, if we adopted this looking to which court it  
17 will ultimately -- will that eliminate some of these  
18 disparities?

19 HONORABLE DAVID GAULTNEY: I think it would.  
20 So, for example, in the original proceedings, I think that  
21 would say, no, not all mandamuses are given CVs. Those  
22 that are in civil matters, give them CVs. Those that are  
23 in criminal law matters, give them CRs, and now you've got  
24 all the courts treating the original proceedings of  
25 mandamuses the same, and then I think there are other

1 instances in which tradition or whatever has developed  
2 that by giving this approach at least, a uniform approach  
3 at the way you look at it, should help.

4 MR. ORSINGER: Well, it seems to me that the  
5 chief justices are asking for help. I don't think we can  
6 define what's civil and criminal here competently, so you  
7 either have to look at where it came from or where it's  
8 going to as a simple way of dividing it, and where it came  
9 from obviously is not reliable. I think that these  
10 investigations have said the court it arises from is not  
11 really determinative; and so of the available solutions,  
12 do nothing, look at the court it came from, continue to  
13 have these unresolved differences of opinion, or look to  
14 the court it's going to, that last one seems to me to be  
15 the simplest solution; and I guess we won't know until you  
16 vet this rule around; but I'm wondering if there's anyone  
17 outside of this room that thinks that's a bad idea? I  
18 mean, have you heard anyone that opposes that approach to  
19 the solution?

20 HONORABLE DAVID GAULTNEY: No.

21 CHAIRMAN BABCOCK: Lonny.

22 PROFESSOR HOFFMAN: Still, I would just --  
23 so I don't disagree, but a simpler solution and one that  
24 doesn't require rule changes that could produce unexpected  
25 consequences would be to give the Council of Chief

1 Justices and all the clerks the benefit of our discussion,  
2 and let them, if they do, in fact, agree that that's a  
3 good way to think about it, have training and educational  
4 sessions with all their clerks; and I think we'll get to  
5 the exact same place, unless you have some sort of, you  
6 know, wayward clerk who's insistent upon some other  
7 means --

8 MR. ORSINGER: No, they disagree with each  
9 other or they wouldn't be coming to us.

10 PROFESSOR HOFFMAN: Maybe, or maybe there  
11 just hasn't been a full vetting of the issue, and given  
12 the nature, and my guess is it's more likely that there  
13 aren't strongly held views, but rather that "This is the  
14 way we've always done it" or "We just don't know" or  
15 "We've been guessing." Now we've had a longer discussion.  
16 Great. Let's give it to them and see if that takes care  
17 of it. I bet it will.

18 CHAIRMAN BABCOCK: And that's where I was  
19 sort of headed. I think that it's been referred to us so  
20 we could give our opinion about the matter, and I think  
21 this has been a helpful discussion, and I'd like to have a  
22 vote on whether the subcommittee's recommended change to  
23 Rule 12.2(a)(4) is agreed upon by this committee, and then  
24 I think the next step, subject to Justice Hecht's view, of  
25 course, would be to go back to the -- you know, back to

1 the clerks and the chief justices and say, "Here's what  
2 we've come up with, the advisory committee thinks this is  
3 -- but we would like to take into account whatever you-all  
4 think," and then at our next meeting we'll pass along our  
5 final recommendation to the Court.

6           So if that's acceptable, everybody that's in  
7 favor of the change that Justice Gaultney has outlined to  
8 Rule 12.2(a)(4) raise your hand.

9           PROFESSOR HOFFMAN: In favor of making a  
10 change?

11           CHAIRMAN BABCOCK: Making this change.

12           All opposed? 21 to 1, in favor. So,  
13 Justice Gaultney, if you would -- if you could report back  
14 to us by the next meeting on what the reaction has been  
15 from the clerks and the Council of Chief Justices then  
16 we'll be in position to send it along to the Court after  
17 the next meeting, so we'll put that on the agenda again.  
18 So that wasn't too bad. Thanks, everybody.

19           And now it's Judge Christopher on the  
20 proposed PJC amendment to Rule 226a.

21           HONORABLE TRACY CHRISTOPHER: Okay. I think  
22 probably the easiest one for you-all to look at is the one  
23 Angie called "blackline." I didn't know that was a  
24 phrase, but the one that has all the comments next to it.  
25 We got this new version of Word that has this cool comment

1 thing added to it, so we started to play with it and it  
2 has all the comments to show you sort of the old versus  
3 the new.

4                   PROFESSOR ALBRIGHT: Does anybody need a  
5 copy?

6                   HONORABLE TRACY CHRISTOPHER: It looks like  
7 this on the inside. If you'll remember, the Pattern Jury  
8 Charge Oversight Committee has been working on revising  
9 Rule 226a because we feel that the instructions to the  
10 jury are not very clear. In fact, we think all of our  
11 pattern jury charges are difficult for the jury to  
12 understand, but we're kind of working on things a step at  
13 a time. This one, because it is a rule, is something that  
14 can be changed easily and efficiently, so we're starting  
15 with it. We went through and tried to put into pretty  
16 much plain language the current instructions and brought  
17 to the Court -- brought to the Supreme Court Advisory  
18 Committee the last couple of meetings, October of '07 and  
19 April of '08, various issues that we wanted the Court to  
20 -- or this committee to look at.

21                   So you'll see first paragraph we have just a  
22 slightly new introduction to it. Second paragraph we've  
23 added the comment per the Supreme Court Advisory Committee  
24 discussion about turning off mobile phones and electronic  
25 devices. We've already voted on all of these things. We

1 just wanted you to see what sort of the final language was  
2 about it.

3           Other than just kind of plain languaging,  
4 nothing is really new here on the first page other than we  
5 have added the -- and you've seen this before. We've  
6 added the little explanation, "We ask you not to mingle or  
7 accept favors to avoid looking like you are friendly with  
8 one side of the case. We ask you not to discuss the case  
9 with others because we do not want you to be influenced by  
10 something other than the evidence presented in court." So  
11 that was just kind of an explanation to the jurors of why  
12 we're asking them to keep everything secret. We thought  
13 that was useful and helped them understand these  
14 instructions more.

15           The last time we were here you asked us --  
16 moving on to the next page, you asked us to look at  
17 defining bias and prejudice. That's been a very difficult  
18 task, and we are not ready to come before this committee  
19 with that definition yet.

20           CHAIRMAN BABCOCK: Fraidy cat.

21           HONORABLE TRACY CHRISTOPHER: So we've --  
22 you know, we've talked about it. We've exchanged drafts.  
23 We're meeting again next month or, no, next week, so we  
24 hope to have something for our next meeting, which is,  
25 what, December or November? But that has been very

1 difficult. You know, we're sort of veering between do we  
2 want to give a legal definition; no, we want to give the  
3 jurors something that they understand, and so the -- but  
4 we don't want to move too far away from the law. Anyway,  
5 it's much more difficult than anyone anticipated. So  
6 those -- these are the instructions that we gave the jury  
7 panel. Nothing for you-all to really vote on. We're just  
8 kind of showing where we are on everything.

9           Again, the next set is for the instructions  
10 to the jury after it has been selected. The only thing  
11 new here, again, is No. 1, telling them to turn off their  
12 phones and don't communicate with anyone during court  
13 proceedings, because that has continued to be a problem.  
14 I brought for you this magazine *Voice for the Defense*  
15 where they actually recommended filing such a motion in  
16 all of their criminal cases to make sure that the court  
17 took control of the juror cell phones because the criminal  
18 defense bar considered it to be such a serious problem in  
19 the criminal cases, so, you know, I think it's just --  
20 it's an important thing to keep emphasizing, so we're  
21 emphasizing it at various points.

22           Again, nothing new here, just trying to put  
23 things in a little bit more plain language. No. 6,  
24 investigating the case on your own, we talked about this  
25 before, specifically mentioning the internet to them.



1 Don't look up things on the internet, because that has  
2 been a problem that people will go back and look up -- and  
3 I even add things like "Don't look up anything about the  
4 lawyer, don't look at their website, don't go look at the  
5 doctor's website," you know, things like that, because  
6 people like to do that.

7           No. 10, we added in, per the discussion with  
8 the advisory committee, the note-taking provision. This  
9 was also in, I think, one of the proposed legislative  
10 bills two years ago that died.

11           PROFESSOR ALBRIGHT: But it's going to be  
12 proposed again.

13           HONORABLE TRACY CHRISTOPHER: But, yeah,  
14 it's going to be proposed again. The only thing, there  
15 was some judges in the small counties felt like they  
16 didn't have a budget to give their jurors paper and a pen  
17 for notes, so that was a big fight about the note-taking  
18 issue. Plus, when you have general jurisdiction judges,  
19 the Court of Criminal Appeals has not been as in favor of  
20 note-taking by jurors. There's -- if you do allow it,  
21 there are big restrictions on it, so we wanted to tell the  
22 general jurisdiction judges that in civil cases we think  
23 it's okay. Everyone here on the Supreme Court Advisory  
24 Committee agreed that we thought it was a good idea to  
25 tell the jurors that they were allowed to take notes.

1 I did want to tell you that I did have a  
2 lawyer call me up a couple of months ago and ask me where  
3 we were on -- if we were going to go any farther about  
4 what to do with the notes after the trial. If you'll  
5 remember, the last time we had a discussion, quite a bit  
6 of discussion, about that. You know, is it the juror's to  
7 take home, should the court take them up and destroy them.  
8 Apparently this may be within the next year or so we'll  
9 have an appellate case on the point because jurors took  
10 notes, they took them home. The losing party subpoenaed  
11 the jurors to show up with their notes. The judge took  
12 the notes into his custody in camera and refused to give  
13 them to the parties, and they've been sent up in camera to  
14 the court of appeals.

15 So they will be -- that apparently is still  
16 a vexing question, or at least it's a question out there.  
17 The last time we discussed it here we decided not to  
18 decide, you know, what people should do with their notes,  
19 so we have written the rule in such a manner. The  
20 proposed legislation that was proposed two years ago did  
21 say that the court was supposed to pick up the notes and  
22 destroy them at the end of trial, but our vote here was no  
23 decision, and that's the way our particular draft here is.

24 Then moving on to the actual charge of the  
25 court section, the instructions that we give along with

1 the legal questions, the thing that's new here that we  
2 might want to talk about is that second paragraph where we  
3 repeat some of the instructions where -- that were in the  
4 first set that the jurors seem to be forgetting a lot,  
5 even though we tell them "Please remember all the previous  
6 instructions we've given you" and even though they  
7 actually have a copy of those previous instructions  
8 rattling around somewhere and there are like -- you know,  
9 a million of them are in our jury room, they seem to  
10 forget some of the major ones. So the major ones that we  
11 put back in there is do not discuss the case with anyone  
12 else, do not do any independent investigation, do not look  
13 up words in dictionaries or on the internet, do not share  
14 your special knowledge or experience, do not use your  
15 phone during deliberations, and then, again, notes.

16           So I've left out a couple of things. I  
17 didn't put insurance back in there. I didn't put in, you  
18 know, don't consider attorney's fees back in there. There  
19 were a few things that I left out, and jurors do sometimes  
20 forget about that insurance question, so, I mean, I could  
21 put that one back in if you wanted to, but if you'll kind  
22 of, you know, look back at what I was trying to summarize,  
23 I was trying to summarize 6, 7, 8, 9, and 10 from the  
24 pretrial set, and putting it back here into the charge of  
25 the court without making the charge of the court really

1 long by repeating all of those instructions.

2           So the investigation, the special knowledge,  
3 but the two that I deleted were the attorney's fees and  
4 the insurance, but I could summarize those and put them  
5 back in if we thought that that would be a good idea to  
6 do. So that's probably the first thing to discuss that's  
7 new that we haven't talked about before. Do you like  
8 this, do you like the shorthand, or should we leave it  
9 out?

10           CHAIRMAN BABCOCK: Okay. Richard.

11           MR. MUNZINGER: In the charge of the court,  
12 the second paragraph you say, "Do not use your mobile  
13 phone during your discussions," but you make no reference  
14 to other electronic devices, and in the other places you  
15 did, and I wondered why. My personal view is you ought to  
16 say "or other electronic devices" because --

17           HONORABLE TRACY CHRISTOPHER: Okay.

18           MR. MUNZINGER: -- I'd use my Blackberry if  
19 I had been told twice before that you can't use your  
20 Blackberry, but you can in the jury deliberations.

21           HONORABLE TRACY CHRISTOPHER: Okay.

22           CHAIRMAN BABCOCK: Frank.

23           MR. GILSTRAP: On the first full page in the  
24 fourth paragraph, "Every juror must obey my instructions.  
25 If you do not follow these instructions, you would be

1 guilty" -- I think it should be "you will be guilty."

2 HONORABLE TRACY CHRISTOPHER: Okay.

3 MR. GILSTRAP: Okay. And down below  
4 paragraph 3 you've got these new paragraphs in there that  
5 -- where you're trying to explain the reason for the  
6 prohibitions.

7 HONORABLE TRACY CHRISTOPHER: Yes.

8 MR. GILSTRAP: I really think that first  
9 sentence is not very clear. You have this "do not," "do  
10 not," "do not," and then you say "we ask you not." You  
11 think I'm about to get another command, but it turns out  
12 what you're trying to say there is "We are asking you not  
13 to mingle because that will make you look like you're  
14 friendly with one side of the case." I think that first  
15 sentence really needs to be worked over. I guess the  
16 problem is it's not clear that the phrase "to avoid  
17 looking like you're friendly" modifies "ask" or "mingle"  
18 or "accept," and I just think that could be made clearer.

19 MR. MEADOWS: While we're there, Frank, do  
20 you mind? I had an issue there or I could save my  
21 comment, too.

22 MR. GILSTRAP: Please. Please.

23 MR. MEADOWS: I think that there are a  
24 couple of things about that particular instruction that I  
25 think need improvement. One is, "ask you not to mingle,"

1 mingle with whom? I mean, they can obviously mingle with  
2 each other, and just taking Frank's point, I just think we  
3 should say "do not mingle with any of the parties or their  
4 lawyers or accept favors from them," comma, "to avoid  
5 looking like," and I think it would be clearer.

6 HONORABLE TRACY CHRISTOPHER: Okay.

7 MR. GILSTRAP: A couple more. I think  
8 there's a couple of places where we had "would" and it  
9 needs to say "will." I also note that what's dropped out  
10 of here is the former statement that says "Texas law  
11 permits" -- and you might have discussed this last time.  
12 "Texas law permits proof of any violation of the rules of  
13 proper jury conduct. By this I mean that jurors and  
14 others may be called upon to testify in open court about  
15 acts of jury misconduct." I don't see anything like that  
16 in the current rule, in the proposal, and I think jurors  
17 need to hear that. In other words, they need to know that  
18 if they do talk about insurance in the jury room, somebody  
19 can bring them in and put them on the witness stand. You  
20 know, that's my comments.

21 CHAIRMAN BABCOCK: Okay. Judge Benton.  
22 Levi, did you have a question?

23 HONORABLE LEVI BENTON: Yeah, just because  
24 it's timely, the Austin American-Statesman online right  
25 now has this headline: "Juror said out-of-court

1 conversation with victim's kin swayed his verdict."

2 MS. CORTELL: Exhibit A.

3 MR. MEADOWS: Levi's doing research for the  
4 committee.

5 CHAIRMAN BABCOCK: Carl, and then Richard  
6 Orsinger.

7 MR. HAMILTON: Was there a reason to take  
8 out the "do not" in No. 3 and change it to "we ask you"?

9 HONORABLE TRACY CHRISTOPHER: Well,  
10 that's -- that paragraph there, "we ask you" was an  
11 attempt to explain the first three do nots, and it sounds  
12 like you-all don't like it. We can take it out.

13 MR. GILSTRAP: It's not a prohibition. When  
14 you read it closely they're not saying -- they're not  
15 telling you not to mingle with. They're saying this is  
16 the reason we're asking you not to mingle with.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE TRACY CHRISTOPHER: Well, No. 1,  
19 we say "Don't mingle and talk" and then that paragraph is  
20 supposed to be an explanation why --

21 MR. MEADOWS: I see. I see.

22 HONORABLE TRACY CHRISTOPHER: -- but if  
23 you-all don't like it -- or I can try to move that "to  
24 avoid looking like you're friendly with one side of the  
25 case" up to the top.

1 CHAIRMAN BABCOCK: Yeah. That was Frank's  
2 proposal.

3 HONORABLE TRACY CHRISTOPHER: Yeah. I can  
4 do that.

5 CHAIRMAN BABCOCK: Richard Orsinger.

6 MR. ORSINGER: I actually was unaware that  
7 the law prohibited voice recordings. I'll ask you about  
8 that afterward. I'm a little scared by delegating to the  
9 trial court the power or even the duty to describe the  
10 current case to the jury and --

11 HONORABLE TRACY CHRISTOPHER: Well, we do  
12 that now.

13 MR. ORSINGER: Well, do they?

14 HONORABLE TRACY CHRISTOPHER: Yeah.

15 MR. ORSINGER: Because I can tell you that  
16 in some of my cases I'm going to have to stand up and  
17 object, depending on what the judge says. Right now they  
18 just say, "This is Jones vs. Smith. This is a so-and-so  
19 case." The description of the current case may be  
20 interpreted as more than just saying, "This is a civil  
21 matter" or "This is a family law matter," and it could  
22 easily be a comment on the weight of the evidence, and I  
23 would hate to stand up and object to the judge when he's  
24 saying "hello" or she's saying "hello" to the jury or the  
25 panel right in front of it. I really -- I think this



1 description of the current case is too much authority to  
2 turn over to the district judges.

3 HONORABLE TRACY CHRISTOPHER: Yeah. It's --  
4 although it is not in Rule 226a, it is in the Judicial  
5 Bench book that -- there's this little break in there that  
6 says "add description of current case."

7 MR. ORSINGER: Well, I haven't had the  
8 problem yet, so maybe this isn't going to increase the  
9 problem, but at any rate, that's my comment; and then I  
10 would prefer -- just my own perspective is that you take  
11 out this "we ask you not to mingle" because I feel like it  
12 waters down the mandatory nature of the instruction.

13 HONORABLE TRACY CHRISTOPHER: Okay.

14 MR. ORSINGER: They really should follow it  
15 because the judge is telling them what to do and not  
16 because it makes sense to them or that they understand the  
17 rationale. To me it kind of weakens it.

18 Also, I had a jury trial in March where one  
19 of the lawyers on the other side was having a conversation  
20 on the elevator, and there were two jurors on the  
21 elevator, and one of the legal assistants on my side heard  
22 it and called it to my attention. This says that they  
23 should report to the court if anyone tries to discuss the  
24 case with them, but it doesn't say that they should report  
25 to the court if someone discusses the case in front of

1 them, and if that legal assistant hadn't been on that  
2 elevator I wouldn't have known that that happened. So I'm  
3 throwing out as a possibility that maybe the jurors should  
4 be the ones to come to the judge and say, "Gosh, Judge, I  
5 inadvertently overheard two people talking about this."

6 "What did they say?"

7                   So, in other words, not just if anyone tries  
8 to discuss the case with you, but since -- let's see, "Do  
9 not allow anyone to discuss the case with you or in front  
10 of you." You could say, "If anyone tries to discuss the  
11 case with you or in front of you, tell me immediately."  
12 You see what I'm saying?

13                   HONORABLE TRACY CHRISTOPHER: Yes.

14                   MR. ORSINGER: Because that way the jurors  
15 are going to be being sure that they're untainted. And  
16 then at the end of the -- when we were about to go into  
17 the voir dire it says, "The lawyers will now begin asking  
18 questions," and of course, it's going to probably be  
19 followed by ten minutes worth of talking, and so I don't  
20 know if we care. I mean, the questions will come  
21 eventually, but you could say the jurors will now -- I  
22 mean, "The lawyers will now begin the jury selection  
23 process" or something like that.

24                   And, now then, once you have the panel --  
25 once you have the petit jury, shifting over to that on

1 item 5, it says, "Don't talk about the case with anyone.  
2 After you've heard the evidence you will then discuss the  
3 case." It occurs to me that maybe you should say, "You  
4 will then retire to the jury room to discuss the case." I  
5 wouldn't want anyone to think that it's okay when they  
6 take a restroom break for two or three of them to start  
7 talking about the evidence. It's my view -- and I don't  
8 know if this is the law or not, but I think the jury's not  
9 supposed to deliberate at all unless the entire jury is  
10 present.

11 HONORABLE TRACY CHRISTOPHER: Yeah, it's in  
12 there.

13 MR. ORSINGER: It is?

14 HONORABLE TRACY CHRISTOPHER: Yeah.

15 MR. ORSINGER: So maybe it would be better  
16 to say "retire to the jury room to," and then on item 6 on  
17 the next page, "cannot have a trial based on evidence not  
18 presented in open court." I would recommend using the  
19 word "admitted" because it may be that evidence is  
20 presented and then stricken after it was -- an objection  
21 is made and then the jury is instructed to disregard, and  
22 I think later on the instructions in the charge are  
23 "evidence has been admitted," so I'd propose that you  
24 consider the word "admitted" instead of "presented."

25 And then my last comment on paragraph 10 is

1 the third sentence starts talking in the passive voice  
2 about "the use of notes are for your own personal use and  
3 may be taken back and consulted." I'm a believer that  
4 it's better and clearer to talk in the active voice, so  
5 you could rewrite that. It's just a suggestion.

6 HONORABLE TRACY CHRISTOPHER: Okay.

7 MR. ORSINGER: "Any notes you take are for  
8 your personal use and you may take them back into the jury  
9 room and consult them during deliberations." To me it's  
10 clearer when you're talking in the active voice --

11 HONORABLE TRACY CHRISTOPHER: Okay.

12 MR. ORSINGER: -- that it's for them. But,  
13 anyway, I like this a whole lot. I think it's a lot  
14 better than the kind of archaic language we use.

15 CHAIRMAN BABCOCK: Mr. Dorsaneo.

16 PROFESSOR DORSANEO: Going back to that  
17 second paragraph under 3, I disagree with Richard  
18 slightly. I think it's -- I think it probably makes --  
19 does make sense to tell them why they can't discuss the  
20 case with a spouse. It seems like a pretty strict  
21 requirement you'd want unless you explained to somebody,  
22 "We don't want you to be influenced by something other  
23 than the evidence presented in court." I think it helps  
24 to tell people why they've been ordered to do this so that  
25 they can behave properly and understand why they're

1 behaving, other than just the judge has said it.

2 HONORABLE TRACY CHRISTOPHER: I have to tell  
3 you a very funny one. We had this most talkative guy on  
4 the jury panel, right. Talk, talk, talk, talk, talk, and  
5 I thought "Oh, somebody's going to strike him." Nope.  
6 There he was, got on the jury panel. He was -- it was a  
7 two-day trial. He came back the next morning and told my  
8 bailiff, Seawood, "Seawood," he said, "That instruction  
9 telling me I couldn't talk about the case with anyone was  
10 just a killer. So I didn't talk about it with anyone. I  
11 just talked out loud about it."

12 MR. GILSTRAP: If they don't talk back, that  
13 might be okay.

14 PROFESSOR DORSANEO: I bet a lot of jurors  
15 talk about the case with their spouses.

16 HONORABLE TRACY CHRISTOPHER: I bet they do.

17 HONORABLE JANE BLAND: We'll never know.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: I agree with Richard  
20 Orsinger, but I think it's the use of the word "we ask."  
21 It implies it's a prefatory type thing as opposed to  
22 mandatory, and explaining why we have the rule is a good  
23 idea, I agree with you, Bill. We just want to do it in  
24 words which make clear that this is a requirement of law  
25 and not just our hope.

1                   PROFESSOR DORSANEO: And then I don't  
2 think -- I think it's a definite bad idea to tell judges  
3 that they have to give a description of the current case.  
4 I mean, that's --

5                   HONORABLE TRACY CHRISTOPHER: I could put  
6 "optional."

7                   PROFESSOR DORSANEO: It would be fair I  
8 think in a lot of cases, and in a lot of courts the lawyer  
9 who knows the least amount about the case is the judge,  
10 and when Mac Taylor was -- became, you know, a Federal  
11 district court judge, and I tried a lot of cases  
12 representing the Community Action Agency in Dallas in  
13 those days, he used to routinely tell the panel what the  
14 case was about, and it was almost always, you know,  
15 inaccurate and had -- and the first thing you had to do  
16 was kind of correct that.

17                   CHAIRMAN BABCOCK: Did you get that down,  
18 David?

19                   MR. JACKSON: I got it. I heard him.

20                   PROFESSOR DORSANEO: Well, I can't get in  
21 trouble from Mac unless he's going to get me from above.

22                   MR. GILSTRAP: He can't hold you in contempt  
23 now.

24                   PROFESSOR DORSANEO: But so I just don't  
25 think that works as a practical matter in a lot of

1 courtrooms, even if the judges are really good judges,  
2 like Mac Taylor was.

3 CHAIRMAN BABCOCK: Judge Peeples.

4 HONORABLE DAVID PEEPLES: I've got several  
5 comments. By the way, I think it's very good, and I  
6 intend to use it before the Supreme Court adopts it, just  
7 give it a test drive.

8 CHAIRMAN BABCOCK: He's a maverick.

9 MR. ORSINGER: Do you need a second on that,  
10 David?

11 HONORABLE TRACY CHRISTOPHER: Well,  
12 actually, reading over the rule again, and I was thinking  
13 of doing the same thing, because it does say "with such  
14 modifications as the circumstances may require," so --

15 HONORABLE DAVID PEEPLES: There won't be an  
16 objection. It will be waived.

17 HONORABLE TRACY CHRISTOPHER: Because no one  
18 listens to you.

19 HONORABLE DAVID PEEPLES: Right. I agree  
20 with what Richard and some of the others said. You know,  
21 there are judges in this state that if you tell them they  
22 can describe the case, it will be "Now, this little family  
23 over here suing this big old company." It's not okay now,  
24 and we shouldn't open that door.

25 At the bottom of that page I think, you

1 know, "we ask you not to mingle," I agree that needs to be  
2 reworded, but it's a great thing to tell them why. I tell  
3 them why all the time, and I add, "Don't go home and use  
4 your family as a sounding board. They haven't heard the  
5 evidence. You have. Wait until it's over and you can  
6 tell them everything," but, you know, I think that's good,  
7 and I disagree respectfully with those who say to take it  
8 out.

9 HONORABLE TRACY CHRISTOPHER: Well, we'll  
10 try to reword it and see if we can come up with something  
11 you like better.

12 HONORABLE DAVID PEEPLES: Two pages over,  
13 where we're now in the -- we've got a jury panel, down at  
14 the bottom, No. 5. I think there ought to be something in  
15 there about going to the jury room, and I think that was  
16 mentioned by Richard or somebody --

17 HONORABLE TRACY CHRISTOPHER: Got that.

18 HONORABLE DAVID PEEPLES: -- but they need  
19 to be told.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 HONORABLE DAVID PEEPLES: The next page,  
22 No. 9, those two sentences are a little bit different, but  
23 I don't know if they're different enough to need two  
24 sentences. "Don't consider insurance" and then "don't  
25 guess about who might be covered." I was wondering was



1 there a reason for having two sentences? Was it a  
2 conscious decision to have two sentences, one that says  
3 "don't consider insurance" and another one that says  
4 "don't guess about it"? You could combine those verbs.

5 HONORABLE TRACY CHRISTOPHER: Well, the  
6 current rule says "Do not consider, discuss, nor  
7 speculate," and we put the word "guess" in instead of  
8 speculate because that's considered to be more friendly,  
9 but we could make it one.

10 HONORABLE DAVID PEEPLES: Well, I just  
11 wondered if -- I would go over to the Roman III, which is  
12 what's in the charge.

13 HONORABLE TRACY CHRISTOPHER: Okay.

14 HONORABLE DAVID PEEPLES: That first one,  
15 "members of the jury," I would say, "You're about to hear  
16 jury arguments" or something. In other words, that seems  
17 to tell them you're getting ready to go out and  
18 deliberate. The truth is after the arguments.

19 HONORABLE TRACY CHRISTOPHER: After the  
20 arguments, okay.

21 HONORABLE DAVID PEEPLES: I think that needs  
22 to be told to them because it's a little misleading. And  
23 then the next paragraph, "Don't discuss the case with  
24 anyone else," when I read this, I was just thinking  
25 there's a difference. Don't ever discuss the case with

1 nonjurors and don't even discuss it among yourselves until  
2 you're in the jury room.

3 HONORABLE TRACY CHRISTOPHER: Well, see, the  
4 sentence right above is there. "You may discuss the case  
5 with other jurors only when you are all in the jury room."

6 HONORABLE DAVID PEEPLES: Yeah. I saw that.  
7 It just seemed to me it wasn't flagged the way we want it  
8 flagged. And then I didn't see anything -- the Roman IV,  
9 which is couple of paragraphs you tell them when they're  
10 discharged.

11 HONORABLE TRACY CHRISTOPHER: Yeah, I  
12 realized I missed that before. Yeah, we had it in a  
13 previous draft, and there wasn't anything new about it  
14 that anyone would comment about.

15 HONORABLE DAVID PEEPLES: Well, it could be  
16 -- from plain English, this plain English stuff, I have  
17 tried to do plain English and thought I did a good job and  
18 then I read this, and I thought why didn't I think of  
19 that? I think it's a great job. Very good.

20 CHAIRMAN BABCOCK: Frank.

21 MR. GILSTRAP: I want to talk about the  
22 mythical quotient verdict, which is in Roman III, old  
23 paragraph 5. It said "a quotient verdict means that the  
24 jurors agree to abide by the result reached." In other  
25 words, they have to agree in advance then. They say,

1 "Okay, I'll vote for \$50," "I'll vote for a hundred, and  
2 we average at 75."

3           Now on instruction 7, which is four pages  
4 from the back -- excuse me, instruction 9, it says, "Do  
5 not decide on a dollar amount by adding up each juror's  
6 amount and figuring the average." I think you can do  
7 that. I mean, I think I've heard -- I've heard these  
8 people want 50 and these people want a hundred, well, I'm  
9 going to vote for 75. It's the agreement ahead of time  
10 that I think is the problem, and I'm not sure that we're  
11 handcuffing the jury in a way that, you know, is  
12 impermissible here.

13           PROFESSOR DORSANEO: Where is that again,  
14 Frank?

15           HONORABLE TRACY CHRISTOPHER: Okay. The  
16 current instruction says, "Do not return a quotient  
17 verdict. A quotient verdict means that the jurors agree  
18 to abide by the result to be reached by adding together  
19 each juror's figures and dividing by the number of jurors  
20 to get an average." That's the current statement.

21           MR. GILSTRAP: Right.

22           HONORABLE TRACY CHRISTOPHER: And we've  
23 rewritten it this way to say, "Some questions might ask  
24 you for a dollar amount. Do not decide on a dollar amount  
25 by adding up each juror's amount and then figuring the

1 average."

2 MR. GILSTRAP: You're telling them what  
3 their internal decision-making process cannot -- can and  
4 cannot be. I'm not sure that's permissible. It's the  
5 agreement among everybody that is -- ahead of time that is  
6 impermissible.

7 PROFESSOR DORSANEO: Right. Because they're  
8 allowed to say, "I think it should be 70," "I think it  
9 should be 50," "I think it should be 40," and then, you  
10 know, compromise.

11 MR. GILSTRAP: Yeah, they compromise.

12 HONORABLE DAVID PEEPLES: Yeah, that's a  
13 good point.

14 HONORABLE TRACY CHRISTOPHER: Well, you  
15 know, if it was me, I would just leave out the whole  
16 quotient verdict concept because no one understands what  
17 it means and --

18 MR. MEADOWS: Does anybody ever think that  
19 really happens, that people will agree among themselves --

20 MR. ORSINGER: My question is when does it  
21 not happen, because how do they ever arise at a compromise  
22 number other than through adding something up and  
23 dividing?

24 PROFESSOR DORSANEO: They don't make an  
25 agreement in advance that they're going --

1 MR. MEADOWS: They don't agree in advance  
2 that that's the way they're going to sort out their  
3 differences, that they're going to make this compact.

4 MR. STORIE: Right.

5 MR. MEADOWS: I don't think that happens. I  
6 think it happens in just a dialogue.

7 MR. MUNZINGER: Well, I don't know whether  
8 any of us know whether it happens or not, but if it  
9 happens, it is a violation of the juror's oath to consider  
10 the evidence. The juror has said, "I agree in advance not  
11 to consider the evidence but to consider the combined vote  
12 of us and divided by 12." I think that's what the  
13 prohibition against quotient verdict was, so if I know  
14 that in advance, I'd say, well, gee, I want a 30  
15 trillion-dollar verdict. That would raise the average a  
16 bit, and that's not what I was told to do by the law,  
17 which was to evaluate the evidence.

18 I don't know that we know jurors do or don't  
19 do it, but I sure don't think we should just erase it from  
20 our jurisprudence and our trial practice. It's stood as  
21 well in my 43 years.

22 MR. GILSTRAP: You don't know that it has.

23 MR. MUNZINGER: I have been comfortable with  
24 the instruction, and I have been comfortable with the  
25 concepts, which I think is an important concept.

1 MR. MEADOWS: Richard, what I'd like -- I  
2 mean, in those years have you ever argued this part of the  
3 charge to the jury?

4 MR. MUNZINGER: No, I don't think I have.

5 MR. MEADOWS: The quotient verdict part. I  
6 certainly haven't.

7 MR. MUNZINGER: No, but at the same time,  
8 when the jurors go in and read that as they are supposed  
9 to do, they know in advance that they aren't supposed to  
10 do it.

11 MR. MEADOWS: But I think Judge Christopher  
12 is saying, and I certainly agree, they have no clue what  
13 that means.

14 MR. MUNZINGER: Judge Christopher and you  
15 and I disagree on that. I think they speak English,  
16 hopefully.

17 HONORABLE TRACY CHRISTOPHER: I'm about to  
18 read you about 30 jury notes that indicate perhaps you're  
19 overestimating them.

20 MR. MUNZINGER: No, I don't overestimate  
21 them, but it's there, and I think it has a salutary  
22 purpose, and I agree it should not be omitted.

23 HONORABLE TRACY CHRISTOPHER: Okay. So you  
24 think it's okay for them to divide up each juror's amount  
25 and do an average. They just can't agree ahead of time to

1 do it?

2 MR. MUNZINGER: I think that's what the law  
3 is.

4 MR. GILSTRAP: Yes. Yes, I do.

5 MR. MUNZINGER: What's the reason for  
6 excluding it?

7 CHAIRMAN BABCOCK: Orsinger.

8 MR. ORSINGER: You know, I don't --

9 HONORABLE TRACY CHRISTOPHER: You know, I  
10 have never done any research on the quotient verdict, so I  
11 can't really tell you what the law is.

12 MR. ORSINGER: I don't know what the law is  
13 either because I've never had that issue come up, but it's  
14 not my understanding that a verdict is returned by at any  
15 time adding up the numbers and dividing by a number, even  
16 if it's after everyone has stated their number, you know,  
17 1, 2, 3, 4, 5. "Well, why don't we just add them all up  
18 and divide by six or 12"? To me they shouldn't be adding  
19 stuff up and dividing it.

20 PROFESSOR DORSANEO: Well, that's an  
21 agreement in advance anyway, agreement in advance of  
22 coming to the conclusion.

23 MR. ORSINGER: Well, I'm not sure I  
24 understand what's "in advance" about. I mean, I'm a  
25 little bit worried about this concept of advance, because

1 if we go around the table and we've got four factions that  
2 are so many thousands of dollars apart and then somebody  
3 says, "Why don't we just add it up, divide by four, and go  
4 home?" Everybody says, "That's a great idea." That's  
5 quotient verdict.

6 PROFESSOR DORSANEO: Right.

7 MR. ORSINGER: They didn't agree to be bound  
8 with it. They heard the numbers and then they divided it.  
9 So I'm not sure I'm seeing why we're helping by saying you  
10 have to -- it's only a quotient verdict if you agree to be  
11 bound before you hear what other people's numbers are. To  
12 me it's if your verdict is not your vote, but it's a  
13 combination of other people's numbers divided by 12 or  
14 whatever. That's a quotient verdict.

15 CHAIRMAN BABCOCK: Yeah, Jeff.

16 MR. BOYD: I just ran Westlaw, and the view  
17 that there's 21 cases, and none of them talk about a prior  
18 agreement. I was with you until I pulled this up. They  
19 all talk about it's an agreement to take the average of  
20 what everybody wants, not that it has to be done in  
21 advance.

22 CHAIRMAN BABCOCK: Justice Hecht.

23 HONORABLE NATHAN HECHT: Well, I'm doing the  
24 same thing. In Casstevens against the Texas and Pacific  
25 Railway Company, Supreme Court case, 1930.



1                   PROFESSOR HOFFMAN: Were you on the court  
2 then?

3                   HONORABLE NATHAN HECHT: So second year on  
4 the court. It says, "When the jurors bound themselves in  
5 advance to answer each special issue in whatever way might  
6 be desired by a majority, none of them could know what  
7 verdict he was obligating himself to return. Such an  
8 agreement is vitiated in like manner as when jurors agree  
9 in advance to assess damages in an amount to be found by  
10 adding the amounts that several jurors favor and dividing  
11 the sum by 12. The courts condemn such quotient verdicts  
12 because each juror substitutes for his own untrammelled  
13 judgment what may chance to be the result of unknown and  
14 unknowable acts. The administration of justice can no  
15 longer be pure if chance determines lawsuits instead of  
16 conscientious fact-findings. The vice in the action of  
17 the jury in this case is more potent than in the ordinary  
18 quotient verdict," and some other stuff. But it seems to  
19 indicate that --

20                   MR. BOYD: You have a better Westlaw than I  
21 do because that one didn't even come up on mine, but I  
22 have like *Latham V. State* here, but it's a recent Tyler  
23 that says, "Jurors may not reach their verdict by lot or  
24 in any other manner that is not a fair expression of the  
25 jurors' opinions," of the jurors -- "appellant alleges

1 that the punishment was assessed by a quotient verdict.  
2 The quotient verdict is the averaging of the positions of  
3 the individual jurors and is impermissible."

4 Oh, wait, wait, wait, wait, wait. "But only  
5 if the jurors agree in advance."

6 HONORABLE NATHAN HECHT: There you go.

7 MR. BOYD: There you go.

8 PROFESSOR DORSANEO: That's the problem with  
9 electronic research.

10 MR. BOYD: Yes, sir, it is. Well, with  
11 quick research.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: Well, I've never  
14 gotten a question about quotient verdict, so I'll leave  
15 that to everybody else, but on paragraph 11 where it says,  
16 "The same 10 jurors must agree on all the answers and then  
17 to the entire verdict," that one always gets questioned,  
18 not always but frequently, and I would propose adding some  
19 sort of explanatory sentence, like something along the  
20 lines of "This means that you cannot have one group of 10  
21 jurors agree on the answer to one question and a different  
22 group of 10 jurors agree on the answer to another  
23 question" or something like that, because this idea that  
24 the same 10 must agree on all the answers and to the  
25 entire verdict gets a lot of questions, and while I'm --

1 I'll give you my other comments.

2 I agree with -- I think it was Frank that  
3 said say "you will be guilty" instead of "you would be  
4 guilty"; and that's there, again, at the bottom of this  
5 page; and I think you would want to say this -- in the  
6 next sentence this -- this would -- instead of "This would  
7 waste your time," "this would be a waste of your time";  
8 and it should be "I might have to order a new trial."

9 And then on the first page can we say,  
10 "Please turn off all the mobile phones and electronic  
11 devices" just to sort of start it off on a friendly note?  
12 If that doesn't sound, you know, strong enough, I just  
13 figure, you know, you being the robe and being the person  
14 in control of the courtroom, you're probably already  
15 coming from a position of authority. It's nice if you ask  
16 them with "please," and then in the second paragraph, the  
17 second sentence says, "We are about to select a jury."  
18 That's like "We are fixing to select a jury." Can we say,  
19 "We are here to select a jury"?

20 MR. MUNZINGER: I like "fixin'."

21 HONORABLE JANE BLAND: I'd rather have  
22 "fixin'" than "about."

23 HONORABLE JAN PATTERSON: I thought this was  
24 plain language.

25 HONORABLE JANE BLAND: Yeah. So "We're here

1 to select a jury." I don't think we need -- in the  
2 paragraph that begins "Here is some background about this  
3 case," I don't think we need to say, "Here is some  
4 background about this case." We can just start, "This is  
5 a civil case." And then the next paragraph, the very  
6 first sentence, "Every juror must obey my instructions"  
7 and then it says "If you do not follow these  
8 instructions," and I would either make it "Every juror  
9 must obey these instructions. If you do not follow these  
10 instructions" or "Every juror must obey my instructions.  
11 If you do not follow my instructions," because when you  
12 use "my" and then substitute "these," that could be  
13 confusing to the jurors as to which set of instructions  
14 you're talking about.

15           And then with respect to paragraph 3 under  
16 "These are the instructions" where we talk about "Do not  
17 discuss the case with anyone, even your spouse or friend.  
18 Do not allow anyone to discuss the case with you" and we  
19 say "or in front of you," but the bigger problem is in  
20 your hearing, and I'm a little worried about if there's  
21 ever any problem that somebody says, "Well, it says not to  
22 discuss it in front of the juror. The juror wasn't in  
23 front of me, the juror was, you know, two tables over."  
24 "The juror was at the restaurant." "The juror was" -- you  
25 know, so I would rather it say -- and I know that it's

1 because of plain language that we said "in front of you,"  
2 but maybe we could say "with you or in your hearing" or  
3 "with you --"

4 MR. WADE: "In the presence of."

5 HONORABLE JANE BLAND: "-- in your  
6 presence." There's something about not wanting to have  
7 "present" in here because we took out "present and  
8 assembled in the jury room," so I don't know if "present"  
9 is not a plain language-friendly word.

10 HONORABLE TRACY CHRISTOPHER: I'll ask  
11 Wayne.

12 HONORABLE JANE BLAND: But "in your hearing"  
13 or "in your presence" would be more accurate, and then if  
14 you wanted to try to change that sentence up -- "I ask you  
15 not to mingle with the parties in this case or their  
16 lawyers or accept favors from them because it will avoid  
17 looking like you are friendly with one side of the case.  
18 I ask you not to" -- and I don't think we should say "we"  
19 because that's sort of like, oh, well, we're all gathered  
20 here, and we don't really want you to do this, but it's  
21 more authoritative if it's "I ask you" because I'm the  
22 judge and the person that's giving you these instructions.  
23 And then on the same comments on the rules  
24 to the actual jury that's impaneled, we could tell them to  
25 please turn off their phones, not just turn off their

1 phones, and I agree with Judge Peeples' comment about that  
2 it needs to reflect that they should be assembled in the  
3 jury room somehow.

4 HONORABLE TRACY CHRISTOPHER: Okay.

5 HONORABLE JANE BLAND: And you might say,  
6 "You may discuss the case with other jurors only when you  
7 are all" -- and "together in the jury room," if "present"  
8 is the word that's presenting the problem because right  
9 now we have "You may discuss the case with other jurors  
10 only when you are all in the jury room," so maybe  
11 "together in the jury room" or "present in the jury room."

12 CHAIRMAN BABCOCK: Okay. Bill and then  
13 Justice Patterson.

14 PROFESSOR DORSANEO: I'll let her go ahead.

15 CHAIRMAN BABCOCK: Justice Patterson.

16 HONORABLE JAN PATTERSON: There are some  
17 people who interpret "please" as permissive, and having  
18 performed my jury duty just this July, I will tell you  
19 that electronic devices are a huge problem, and everybody  
20 is -- I mean, it is buzzing all around. I was just  
21 amazed, and so if "turn off" is too abrupt perhaps we  
22 could say, "You must turn off," but I will tell you it's a  
23 problem in all of the courts, and it's not just a  
24 distraction. It is for if it goes off, people are  
25 constantly checking everything, and I think the important

1 thing is that for emergencies you can leave a number, but  
2 they have to be off, and so I think it almost can't be too  
3 strong, and it has to be mandatory.

4           The other small comment I have is on  
5 "Remember that you took an oath that you will tell the  
6 truth." I would put a period there and say, "You must be  
7 truthful." I think "truthful" is a stronger word than  
8 "honest." I'm not quite sure how "honest" diverges from  
9 "truthful," but "you must be honest when the lawyers ask  
10 you questions and always give complete answers," so and  
11 since you just said "tell the truth," I think it  
12 emphasizes there is something special about the truth, and  
13 "honest" is a subcategory of that.

14           HONORABLE TRACY CHRISTOPHER: Okay.

15           CHAIRMAN BABCOCK: Justice Bland.

16           HONORABLE JANE BLAND: Well, the thing about  
17 the cell phones, it is not a juror's intention to violate  
18 the court's rule. What happens is they go out on their  
19 break or they go out for lunch and they do all the stuff  
20 they're trying to get done because they're at jury duty  
21 that they can't get done because they're not at work or  
22 they're not at home. They make all their phone calls, and  
23 they come back into court and they forget to turn it back  
24 off, and they's why they go off. I mean, and that's why  
25 they go off all the time, so --

1 HONORABLE JAN PATTERSON: No. No. No.  
2 They're checking it during.

3 HONORABLE TRACY CHRISTOPHER: People are  
4 reading their Blackberries during voir dire.

5 HONORABLE JANE BLAND: Well, that's true.

6 HONORABLE TRACY CHRISTOPHER: And trial. Of  
7 course, so are the lawyers.

8 HONORABLE JAN PATTERSON: There is no way --

9 HONORABLE JANE BLAND: Yeah. So are the  
10 judges, for that matter.

11 HONORABLE JAN PATTERSON: They can't pay  
12 attention -- I'm sorry. They can't pay attention when  
13 they're checking --

14 HONORABLE JANE BLAND: Right, no, but I'm  
15 just saying that it's not because they don't  
16 understand the -- I mean, a lot of times -- I mean, if  
17 that's just the true -- I mean, obviously you have to  
18 handle a juror that's not obeying your instruction, but I  
19 mean, like the case I tried a couple of weeks ago,  
20 everyday somebody had their phone went off right after  
21 lunch because they forgot to turn them off, and all you  
22 have to do is give them a look and they know immediately  
23 that they've screwed up, and there but for the grace of  
24 god go I because who hasn't forgotten to turn their cell  
25 phone off somewhere? You know, now, I guess we could say,



1 "Cell phones are not permitted in the courtroom" or if we  
2 really wanted to be good about it, have the bailiff take  
3 them all up.

4 HONORABLE JAN PATTERSON: Well, I just think  
5 that something that is not permissive but is mandatory  
6 makes it clear, and that way people don't interpret it as  
7 not applying to me. That's what -- whenever you say  
8 "please," people say, "Well, that doesn't apply to me."

9 CHAIRMAN BABCOCK: Ralph, and then Bill.

10 MR. DUGGINS: Have we considered what jurors  
11 considered or what they infer from use -- this is under 6  
12 in the charge of the court, and we say "define  
13 preponderance of the evidence and define it as the greater  
14 weight and degree." What is meant by "degree"?

15 HONORABLE TRACY CHRISTOPHER: Okay. Well,  
16 we dropped out "degree." Oh, well, I meant to. We had  
17 voted to drop out "degree," sorry.

18 MR. DUGGINS: Good.

19 CHAIRMAN BABCOCK: Bill.

20 MR. WADE: I just think -- I agree with her.  
21 I just think you can't be strong enough about that -- I  
22 think the cell phones, I think they ought to be told cell  
23 phones are just not permitted.

24 HONORABLE JANE BLAND: No "please," okay.

25 MR. WADE: If the lawyer's goes off it costs

1 them 50 bucks.

2 HONORABLE LEVI BENTON: So, let's see, if  
3 you were Richard Munzinger in the 215th, and I either  
4 refuse to give it or overlook giving that instruction  
5 what's -- and I violated your substantive rights and a new  
6 trial is required? Because I just think we ought to treat  
7 people like adults and they will behave like adults.

8 HONORABLE TRACY CHRISTOPHER: Levi, you lost  
9 this vote. Remember that.

10 MR. WADE: Okay. All right. I just don't  
11 see people acting like adults with cell phones. Maybe I'm  
12 wrong.

13 CHAIRMAN BABCOCK: Harvey.

14 HONORABLE HARVEY BROWN: One of the things I  
15 like, Judge Christopher, that you-all did is explain the  
16 rationale behind some of the rules. I mean, I think that  
17 really does help, and I tried to do that because you get  
18 better compliance if people understand why. I think it  
19 might help with the cell phones, too. Just tell them why.  
20 "You might miss a question that could be very important,"  
21 you know, or just something like that that will help them  
22 understand it. I think that helps a little bit with your  
23 "please."

24 HONORABLE JAN PATTERSON: It makes you  
25 stupid.

1                   HONORABLE HARVEY BROWN: It softens it at  
2 least. Instruction No. 1, the very last sentence when you  
3 say, "They have to follow these instructions, too, so they  
4 will not be offended when you follow the instructions." I  
5 always took the old instruction that says, "You'll  
6 understand it when they do" as not looking at the -- from  
7 that perspective, but looking at it from the other  
8 perspective, and by that what I mean is I would say, "So  
9 you should not be offended when the lawyers follow these  
10 instructions." I mean, as a lawyer I'm always worried if  
11 a juror says something to me and I don't respond. I think  
12 that's the emphasis of the current rule is "Don't be  
13 offended that the lawyers aren't friendly to you." So I  
14 would change it to "so you should not be offended when the  
15 lawyers follow the instructions."

16                   The instructions that you give a couple of  
17 pages later after the jury has been selected, No. 6, first  
18 bullet point, "Do not try to get information about the  
19 case," I think you should say "the case, the lawyers, or  
20 the issues in the case," something a little broader,  
21 because I do know a lot of people do research on the  
22 lawyers. That's come up in some of my cases.

23                   On the internet, the third bullet point, I  
24 think that's important enough I would make it its own  
25 bullet point, because I think that's the one that is

1 frequently violated, so I would stop after "public  
2 record," put a period, and then make the internet its own  
3 point.

4           On point 10 you say, "Do not share your  
5 notes." I don't know what that means. I don't know if  
6 that means hand them my notes or I can't read them my  
7 notes or I can't discuss what's in my notes. So I think  
8 that's vague. I think we need to decide which one we  
9 want.

10           On the instructions to the jury before  
11 answering the questions and reaching a verdict, I like  
12 what you did on the introduction. The only suggestion I  
13 have is, one, the word "share" again is in there, "share  
14 your notes" on the second to last sentence. I think  
15 that's vague. In the fourth sentence, "Do not look up any  
16 words in dictionaries." It's not just looking up words on  
17 the internet. It's looking up research on the internet,  
18 so I would say "or conduct any research on the internet."  
19 I'd make it a little broader, but I thought it was really  
20 good.

21           CHAIRMAN BABCOCK: Bill had his hand up and  
22 then Richard.

23           PROFESSOR DORSANEO: On that same 10  
24 business, that's really quite tricky because I guess if we  
25 have broad form submission it's not as much of a problem,

1 but really 292 is not that helpful a rule because  
2 occasionally you'll get a situation where the same 10  
3 agree to material issues and then they think that they  
4 need to agree on an issue that would cause the case to,  
5 you know, go the other way. It isn't really true that the  
6 same 10 need to be giving an answer to every question  
7 that's asked. It's sometimes if you get the answer to  
8 this question, 10 out of 12, then that means the defendant  
9 wins, even though the first two questions were headed  
10 toward a plaintiff's verdict. So I don't know if it's  
11 helpful or harmful to be talking about it more in these  
12 instructions. It's difficult to talk about it in a way  
13 that actually explains what we want to convey, and I was  
14 wondering what the notes you were talking about, what do  
15 they ask about?

16 HONORABLE TRACY CHRISTOPHER: Well, this  
17 actually, the 10-2 verdict and especially in a case where  
18 we have unanimous questions thrown in is the single most  
19 problematic question that we get over and over again. "If  
20 there is not unanimous agreement on every question, do the  
21 same 10, minimum 10 jurors, have to agree on subsequent  
22 questions?"

23 "May we have a legal dictionary which would  
24 include the definition of 'stopped'?"

25 "Signed as unanimous, but not. Can we get a

1 new certificate page?"

2 "We had 10 people agree to the first  
3 question, but now do the same 10 and not the other two  
4 proceed with question two? And then do the other two  
5 contribute anything to the other questions?" We get that  
6 one a lot. I mean, that's a serious one that we don't  
7 really describe the answer to.

8 PROFESSOR DORSANEO: Well, I think some of  
9 these questions ought to be anticipated and answered. I  
10 don't know if saying "same 10 means same 10 to each and"  
11 -- "or more to each and every question" gets that done.

12 HONORABLE TRACY CHRISTOPHER: "We would like  
13 clarification on the standards to answer question 4."  
14 This was from my court. "I don't understand your  
15 question."

16 "First, to consider question 4, does it  
17 require a unanimous 'yes' or 'no' on either question 1 or  
18 2?" "Yes."

19 "Second, is a unanimous vote required to  
20 answer 'yes' to 4? Does it require a minimum of 10 votes  
21 to answer 'no'?" The answer is "yes," because of that  
22 screwy rule that we have.

23 "If you cannot achieve one or the other, are  
24 we to leave the question unanswered?" And my answer was  
25 "You should continue to deliberate until you achieve one

1 or the other." I mean, it's -- "We have answered  
2 unanimously on all but one question. On the one question  
3 we voted 10-2. Is our verdict considered unanimous or do  
4 we need to sign the bottom on account of the one  
5 question?"

6 PROFESSOR DORSANEO: Oh, okay.

7 HONORABLE TRACY CHRISTOPHER: "We had a  
8 verdict certificate where 10 people signed at the bottom  
9 and the presiding juror signed at the top."

10 PROFESSOR DORSANEO: Stephen's idea about  
11 everybody signing makes sense to me.

12 HONORABLE TRACY CHRISTOPHER: Right. And  
13 that verdict actually ended up being an 11-1. Sometimes,  
14 though, when the presiding juror signs at the top he's a  
15 dissenter, and it's really only a 10-2, but he thinks he's  
16 supposed to certify to the 10-2 verdict.

17 You'll like this one: "Is the burden of  
18 proof on plaintiff to prove that they did breach fiduciary  
19 duty or on the defendant to prove they did not breach the  
20 fiduciary duty?" One of the shifting burden questions in  
21 the PJC, which is extremely difficult.

22 "What vote is required to answer 'yes' or  
23 'no' to question No. 1? What if nine of us say 'yes' and  
24 three say 'no'?"

25 "With regard to question 4, must an award of

1 damages be unanimous?"

2 "Does the vote in the corresponding question  
3 matter, or is everyone required to assume a 'no'?"

4 I think that was my "yes" or "no" questions.  
5 Then you'll -- some of these other ones are pretty  
6 interesting, too. "In question 1 what is the definition  
7 of occurrence? Is it the accident or the surgery?"

8 "Is there a legal definition for physical  
9 pain under Texas law? If so, please provide it."

10 "Can we have the easel?"

11 "No."

12 "Can there be an appeal? If so, how long  
13 and how many times?"

14 "Is there a minimum and a maximum amount to  
15 play with?"

16 "Please clarify question 5."

17 This was a good one: "Is there a transcript  
18 for this question to be clearer for us?"

19 "What is the relevance of this question?"

20 This is -- this one would scare anyone:

21 "Who is the attorney referred to in question No. 3?" It  
22 was an attorney's fees question. Okay.

23 "We're having trouble finding the insurance  
24 policy. The policy itself is not in evidence." Actually,  
25 it was a case about insurance, so it wasn't that funny,



1 but it was still -- it was a good one. So I've just been  
2 collecting these for the past, I guess, six months just to  
3 show you what we get sort of, and I mean, the vast  
4 majority of the questions are "Can we have the transcript  
5 of so-and-so's deposition?" We get that a lot.

6 Do we want to -- some of these I thought  
7 were substantive. Do you want to vote on a few of them?

8 CHAIRMAN BABCOCK: Sure. Tom's got a  
9 comment before we do that.

10 MR. RINEY: I was just going to make an  
11 observation. It's very difficult to argue with someone  
12 that brings physical evidence in support of her position.  
13 I mean, that really is -- I would never have guessed there  
14 was that much misunderstanding about the 10-2.

15 HONORABLE TRACY CHRISTOPHER: I mean, it is  
16 amazing, and I actually kind of like Stephen's idea to  
17 make everybody sign either way. Yes.

18 MR. ORSINGER: It seems to me that the sign  
19 for -- that "10 or more of you agree on" is almost  
20 impossible to work if you have to have unanimous vote on  
21 one question, because if you did have to have 12 on one  
22 question but only 10 on the others, this instruction  
23 cannot be followed correctly.

24 HONORABLE TRACY CHRISTOPHER: Well, see, it  
25 says "unless the question has a different instruction."

1 CHAIRMAN BABCOCK: Right.

2 MR. ORSINGER: Well, no, look on the last  
3 page.

4 HONORABLE TRACY CHRISTOPHER: We put that in  
5 there because it's so confusing.

6 MR. ORSINGER: On the last page it said  
7 "preside over your" -- No. 2, "Preside over your  
8 deliberations. This means the presiding juror will take  
9 the lead in discussions, write down the answers that 10 or  
10 more of you agree on, and see that you follow the  
11 instructions." Then down there it's "sign the verdict  
12 certificate if all 12 jurors agree or get the signatures  
13 of all those who agree if the verdict is not by all 12.  
14 Remember, if the verdict is not by all 12, the same 10 or  
15 11 must have agreed to every answer."

16 If you have one question that requires  
17 unanimity, I think that I wouldn't even know how to follow  
18 those instructions, or maybe I just don't understand this,  
19 but to me, to me you've got a problem because you're  
20 trying to get a verdict that's supported by at least 10  
21 votes, but there's one question that requires 12 votes,  
22 and yet these instructions are written that "Don't return  
23 a verdict until you have at least 10. If it's unanimous,  
24 only one of you needs to sign," but what if the one  
25 question must be unanimous and is unanimous, but -- you

1 see what I'm saying? The other is only 11. What are they  
2 supposed to do?

3 CHAIRMAN BABCOCK: Well, I mean --

4 HONORABLE TRACY CHRISTOPHER: I do think our  
5 verdict certificate, which is new, helps, but perhaps  
6 you're right that those instructions are confusing. And  
7 what we did here was to say, you know, "All 12 of us have  
8 agreed," "11 of us have agreed to every answer," "10 of us  
9 have agreed to every answer," but it's just confusing when  
10 some of them are unanimous.

11 MR. ORSINGER: What if you said that --

12 HONORABLE TRACY CHRISTOPHER: And other than  
13 having a signature page after every question so that we  
14 know that they know what they're doing --

15 MR. ORSINGER: What if you said "the  
16 required number of jurors" and just punted on the 10  
17 versus -- I mean, you have the 12 built into the question  
18 that requires 12. You have a generic default 10 on all  
19 other questions.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 MR. ORSINGER: And then you say if you have  
22 the required number -- and I'm not saying how you're going  
23 to write that, but --

24 HONORABLE TRACY CHRISTOPHER: Okay.

25 MR. ORSINGER: -- maybe the problem is

1 trying to pin it down between 10 and 12.

2 CHAIRMAN BABCOCK: Richard, do you think the  
3 certificate is clear enough, the verdict certificate and  
4 the additional certificate?

5 MR. ORSINGER: You know, I think a lot of  
6 this could be simplified if everybody that supported the  
7 jury verdict had to sign and some of them -- some  
8 questions may require 12, others only 10, but if you  
9 support what the charge requires, you sign; and then you  
10 don't get into this business about whether it's just the  
11 signature of the presiding juror versus the others.  
12 Everybody that supports the verdict, some of which has to  
13 be at least 10, some of which have to be all 12, if they  
14 all sign it, doesn't that simplify this?

15 HONORABLE TRACY CHRISTOPHER: I think it  
16 will. I just never thought of that because I guess we  
17 just sort of have the tradition of the presiding juror  
18 signing for a unanimous jury, but, I mean, I don't see why  
19 we couldn't change it to have all 12 of them sign.

20 CHAIRMAN BABCOCK: Tracy, what --

21 MR. ORSINGER: What do you do if -- say it's  
22 10 to 2 -- let's say it's 10 to 2 on the damage question,  
23 but it's unanimous on gross negligence. Who's signing  
24 that? Who's going to sign, because all 12 sign the --

25 HONORABLE TRACY CHRISTOPHER: Well, if you

1 have a requirement of unanimous you've got to have that  
2 second certificate.

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE TRACY CHRISTOPHER: And that's why  
5 you would put down -- on that gross question you would say  
6 that, you know, question 5 required a unanimous.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE TRACY CHRISTOPHER: And for it to  
9 be valid you have to have the two certificates for a mixed  
10 case where you have some 10-2 and some unanimous.

11 MR. ORSINGER: So if you have two, I don't  
12 know if it's ever possible to have two or three unanimous  
13 questions, but if you did --

14 HONORABLE TRACY CHRISTOPHER: Well, you do,  
15 because you have to have liability unanimous and gross  
16 unanimous.

17 MR. ORSINGER: So --

18 HONORABLE TRACY CHRISTOPHER: But not  
19 damages unanimous.

20 MR. ORSINGER: Okay, and so they understand  
21 that all 12 of them have to sign?

22 HONORABLE TRACY CHRISTOPHER: No, they don't  
23 understand it, because they keep asking those questions,  
24 and we keep trying to figure out some way to make it  
25 easier to understand; and in fact, I mean, really, even

1 the law that says, you know, you have to give them this  
2 instruction, the instruction that we have to give them, is  
3 confusing.

4 PROFESSOR CARLSON: Right.

5 HONORABLE TRACY CHRISTOPHER: Any  
6 suggestions anyone has to make this better. I mean, I'd  
7 be glad to go to the everyone has to sign, if you-all  
8 think that that would be easier, but --

9 MR. JEFFERSON: Everyone has to sign what?

10 MR. RINEY: Each question.

11 MR. JEFFERSON: Each question?

12 HONORABLE TRACY CHRISTOPHER: No, the  
13 certificate.

14 CHAIRMAN BABCOCK: To me this certificate  
15 form is fine. Very clear.

16 MR. JEFFERSON: I like the form as it is.

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: I think the new  
19 certificate form is fine, but if everybody wanted to do  
20 everyone has to sign, that's okay, too. It's just there  
21 are a fair number of trials that are unanimous, and it's  
22 just a little faster to have the presiding juror sign.

23 On that last page before the certificate, I  
24 see that it would make it less awkward, Richard, if we  
25 took out the number 10, but in the vast majority of trials

1 it's going to be 10, and I think if we take the number out  
2 then we're going to get -- the more we say "10," the  
3 better, because then everybody knows the number that they  
4 need for agreement is 10 or more, and if we take it out I  
5 think it might even get more confusing.

6 HONORABLE TRACY CHRISTOPHER: Maybe I should  
7 do a bracketed paragraph to be submitted only if there's a  
8 mixed case and try to handle it that way.

9 HONORABLE JANE BLAND: I think that would be  
10 great if you're willing to try that.

11 HONORABLE TRACY CHRISTOPHER: Okay. I'll  
12 try that.

13 HONORABLE JANE BLAND: And then I would say  
14 instead of "Do you understand the duties of the presiding  
15 juror," maybe "Do you understand my instructions" because  
16 I think we're all concerned that they understand all the  
17 other instructions, or at least as concerned that they  
18 understand all the other instructions as we are that they  
19 understand the duties of the presiding juror.

20 HONORABLE TRACY CHRISTOPHER: Okay.

21 MR. ORSINGER: Judge Christopher?

22 HONORABLE TRACY CHRISTOPHER: Yes?

23 MR. ORSINGER: Can I also suggest that in a  
24 case where you do have unanimous questions that maybe you  
25 should put the unanimous signature first and then say, "As

1 to all other questions," and then have your certificate  
2 here, because I would be confused if I had to go with  
3 either 12, 11, or 10 and sign or not sign and then come  
4 back over here as -- it makes more sense to me to say, "I  
5 certify the jury was unanimous on question 10" and then  
6 the following question is --

7 HONORABLE STEPHEN YELENOSKY: Wait a minute,  
8 you didn't tell me Orsinger was going to be here. I  
9 wouldn't have come back.

10 MR. ORSINGER: 12, 11, or 10 would be all  
11 other questions. To me that might make more sense to  
12 them.

13 CHAIRMAN BABCOCK: Bill.

14 PROFESSOR DORSANEO: I'm going to say this  
15 again, when I'm looking at this check 1, 2, or 3 at the  
16 back, and it may not be a problem because of the way we  
17 submit cases, but this -- the second and third options,  
18 because of the problem with Rule 292 saying 10  
19 requirement, may have unintended consequences here because  
20 it's possible for 10 out of 12 or 11 out of 12 to answer a  
21 question that gets the defendant to win when the other  
22 questions are answered by a different 10 or a different  
23 11.

24 HONORABLE JANE BLAND: But we usually solve  
25 that with predication. If, for example, the one question



1 causes the defendant to win, they usually stop.

2 PROFESSOR DORSANEO: Yeah, but if somebody  
3 doesn't handle it with predication then the jury is going  
4 to wonder whether they have to agree on something they  
5 can't agree on because one side thinks the plaintiff  
6 should win and the other side thinks the plaintiff should  
7 lose.

8 HONORABLE JANE BLAND: That's exactly -- and  
9 then they get hung up on something that doesn't -- that's  
10 meaningless, and that was the whole HEB case, that --

11 HONORABLE TRACY CHRISTOPHER: Why we wanted  
12 predication.

13 HONORABLE JANE BLAND: -- why we wanted  
14 predication.

15 HONORABLE STEPHEN YELENOSKY: They don't  
16 reach it if --

17 HONORABLE JANE BLAND: Tracy's amicus brief.

18 HONORABLE TRACY CHRISTOPHER: Which Justice  
19 Hecht criticized.

20 PROFESSOR DORSANEO: What's the name of the  
21 case that we --

22 HONORABLE JANE BLAND: It was only umpteen  
23 years ago.

24 HONORABLE TRACY CHRISTOPHER: But I'm not  
25 bitter about it.

1 PROFESSOR CARLSON: *Fleet vs. Fleet.*

2 CHAIRMAN BABCOCK: *Fleet*, that critical word  
3 there.

4 PROFESSOR DORSANEO: No, it's before *Fleet*.  
5 The one that --

6 PROFESSOR CARLSON: *McCauley*.

7 PROFESSOR DORSANEO: *McCauley vs.*  
8 *Consolidated*. No, is that -- maybe I'm getting the name  
9 wrong.

10 PROFESSOR CARLSON: *McCauley vs. Hartford?*

11 PROFESSOR DORSANEO: *McCauley* case out of  
12 Tyler. It was one of Mike's cases, Mike Hatchell's cases,  
13 and the Tyler court said the same 10 means same 10, even  
14 if that means that the jury can't possibly reach a verdict  
15 here because they've reached a verdict that the defendant  
16 should win, but on the other questions we can't get to the  
17 same 10.

18 HONORABLE TRACY CHRISTOPHER: Right.

19 HONORABLE JANE BLAND: That's right.

20 HONORABLE TRACY CHRISTOPHER: That's it.  
21 That's a mistrial.

22 PROFESSOR DORSANEO: But something needs to  
23 be done about that, and now it's just being kind of --

24 PROFESSOR CARLSON: Perpetuated.

25 PROFESSOR DORSANEO: -- expanded by talking

1 about it too much in these instructions because it doesn't  
2 mean the same 10 to every question. It means the same 10  
3 to every material question, and you don't get to know that  
4 until you know what the answers are.

5 HONORABLE TRACY CHRISTOPHER: Well, it's the  
6 same 10 to every required answer. I mean --

7 PROFESSOR DORSANEO: No, it isn't.

8 PROFESSOR CARLSON: No.

9 PROFESSOR DORSANEO: It's the same 10 to  
10 every material -- to every question that would determine  
11 the outcome.

12 HONORABLE TRACY CHRISTOPHER: Well --

13 CHAIRMAN BABCOCK: Yeah, Elaine.

14 PROFESSOR CARLSON: I speak Bill.

15 HONORABLE TRACY CHRISTOPHER: -- I can't say  
16 that I've ever taken a verdict, a partial verdict, like  
17 you're talking about.

18 CHAIRMAN BABCOCK: What?

19 PROFESSOR CARLSON: I speak Bill. I said,  
20 "I speak Bill." I think what Bill's suggesting, I agree  
21 with him, is that the case law tells us that the same 10  
22 jurors have to agree to all material questions. We don't  
23 usually submit questions that are immaterial, but the  
24 answer to the jury to some questions may make the answers  
25 to others immaterial, and the jury does not need to answer

1 them, and the *Fleet vs. Fleet* case says it will carry a  
2 verdict. The problem with it, Bill, is you don't know  
3 until you see what the jury has answered --

4 PROFESSOR DORSANEO: Right.

5 PROFESSOR CARLSON: -- when they haven't  
6 answered everything 10 or 12. So they think they have an  
7 incomplete verdict when, in fact, there may be a complete  
8 verdict. How do you deal with that in an instruction?

9 PROFESSOR DORSANEO: I don't know, but  
10 talking -- but, to me, repeating the requirement that is  
11 really not as stated, okay --

12 PROFESSOR CARLSON: Doesn't help.

13 PROFESSOR DORSANEO: -- is not -- doesn't  
14 help things.

15 PROFESSOR CARLSON: And you can't tell them  
16 to answer only -- you must have at least 10 answers to the  
17 material questions because you don't know what's material  
18 until they start answering the questions.

19 PROFESSOR DORSANEO: They won't know.

20 HONORABLE STEPHEN YELENOSKY: And why  
21 doesn't precondition take care of it or the predicate  
22 language?

23 HONORABLE JANE BLAND: Because then you  
24 won't answer a question that is immaterial --

25 HONORABLE TRACY CHRISTOPHER: Right.

1 HONORABLE JANE BLAND: -- if you predicate  
2 it properly.

3 HONORABLE STEPHEN YELENOSKY: Yeah. So why  
4 doesn't that take care of it?

5 HONORABLE JANE BLAND: It does, but I guess  
6 he's talking about the case where --

7 HONORABLE STEPHEN YELENOSKY: They didn't  
8 predicate it?

9 HONORABLE JANE BLAND: Judges are  
10 predicating now because of that.

11 PROFESSOR DORSANEO: I think it helps, but  
12 you don't really know what's material until you know what  
13 answers the jury gives. There may be one question that  
14 that's the only one the defendant needed to have answered  
15 in order for there to be a take nothing judgment.

16 HONORABLE STEPHEN YELENOSKY: Well, but then  
17 you would predicate it that way. I have not seen a charge  
18 yet that --

19 MR. GILSTRAP: There's no way to solve that  
20 problem.

21 PROFESSOR DORSANEO: There's no way to  
22 predicate that. I mean, they have to answer that.

23 HONORABLE STEPHEN YELENOSKY: Oh. Well --

24 HONORABLE NATHAN HECHT: If 10 people agree  
25 to the plaintiff's liability question, but a different 10

1 agree to limitations.

2 MR. GILSTRAP: But how are you going to  
3 solve that in the jury charge? Are you going to say, "If  
4 10 of you agree to question A, answer that, and if a  
5 different 10 agree to question B, answer that"? I mean,  
6 that's the only other way to do it.

7 PROFESSOR DORSANEO: Well, I think a simple  
8 "same," you know, "10 out of 12 need to answer," but then  
9 don't get into all this more-to-it stuff, and it's --  
10 unless we figure out a way to solve the problem. I don't  
11 know a way to solve the problem.

12 MR. GILSTRAP: But the problem is they'll go  
13 in and say, "Okay, we've got 10 on question A and now  
14 we've got 10 on question B. It's a different 10. Let's  
15 move on," whereas if they stayed after it they might get  
16 the same 10 on question B.

17 I mean, I just don't think it's a -- I mean,  
18 it's a nice theoretical problem, but I don't see the  
19 practical solution in the jury charge.

20 HONORABLE STEPHEN YELENOSKY: And why  
21 couldn't you -- why couldn't the first question -- if  
22 you're saying the limitations answer would --

23 PROFESSOR CARLSON: Be dispositive.

24 HONORABLE STEPHEN YELENOSKY: -- would be  
25 dispositive and obviate all the other questions, you put

1 it first, and if you answered this question "yes," you're  
2 done. You still condition it. Don't we lay out charges  
3 that way so that you don't go to the next one unless you  
4 have to?

5 HONORABLE NATHAN HECHT: You're going to  
6 have to have a conditional and limitations question.

7 HONORABLE STEPHEN YELENOSKY: Well, why  
8 couldn't you do that?

9 (Multiple simultaneous speakers.)

10 HONORABLE JAN PATTERSON: One at a time for  
11 the reporter. Remember the reporter.

12 HONORABLE DAVID PEEPLES: Can I ask a  
13 question here? Bill, how would -- if you have different  
14 groups of 10, how could you get 10 people to sign that  
15 they agreed to everything? I mean, I understand that you  
16 might -- in the jury room there might be different  
17 coalitions of 10, and if you looked at one set of answers  
18 one person would win and if you looked at another a  
19 different part of them would win, but how could you get 10  
20 people to sign at the end "I agree with every answer"?

21 PROFESSOR DORSANEO: Well, I don't think  
22 there's an easy answer to any of these questions. The  
23 only point I'm making is that the simple language in Rule  
24 292, which is kind of rearticulated in this draft from  
25 place to place, is something that needs some review and

1 attention, and my only -- my only way to deal with it at  
2 this point would be not to be telling them over and over  
3 again that it absolutely has to be the same 10 to all of  
4 the questions. Because that's just not right.

5 HONORABLE STEPHEN YELENOSKY: Well, it's not  
6 right if it can't be predicated insofar -- I guess I  
7 haven't been convinced you can't predicate it properly.

8 HONORABLE NATHAN HECHT: Well, I wouldn't  
9 want to predicate --

10 HONORABLE TRACY CHRISTOPHER: Well, if it's  
11 possible it seems to me you would have to have certificate  
12 pages. I mean, I can't imagine the scenario you're  
13 talking about because I think, like Stephen, we could  
14 predicate it away, but assuming you had a distinct issue  
15 that could be 10-2 and could end the case, I mean, why  
16 would you want them to answer the rest of the questions?  
17 I mean, although there was -- and this is kind of  
18 interesting -- one trial judge, I don't know if she still  
19 does it, but in your typical plaintiff/defendant  
20 negligence pattern jury charge has both of those  
21 submitted. She actually submits only the defendant and  
22 then if you've answered "yes" as to the defendant then  
23 answer as to the plaintiff, because she doesn't want them  
24 to get hung up on whether the plaintiff was negligent.

25 So I mean, you know, yeah, you're right. I



1 mean, there is sort of this kind of bizarre thing where if  
2 the defense lawyer doesn't get up and argue, you know,  
3 it's okay to put "no," "no," they get real confused  
4 because they think the answer is "no" to the defendant,  
5 but they feel like, you know, someone has to be at fault  
6 in this wreck, but they don't want to answer "yes" to the  
7 plaintiff. They don't want the plaintiff to be -- you  
8 know, feel responsible for this accident.

9 HONORABLE STEPHEN YELENOSKY: Justice Hecht,  
10 you're suggesting you wouldn't want to predicate in the  
11 way that I'm suggesting there, like put the limitations  
12 first?

13 HONORABLE NATHAN HECHT: Well, when I was a  
14 trial judge I wanted them to answer every question I could  
15 think of so I wouldn't have to try it again.

16 MR. ORSINGER: Because if there's no  
17 evidence to support the predicate you can render the  
18 correct judgment on appeal, but if you don't get those  
19 other answers because of that predicate question, you get  
20 a new jury trial.

21 HONORABLE NATHAN HECHT: I mean, if they  
22 have some --

23 HONORABLE STEPHEN YELENOSKY: Well, that's  
24 true.

25 HONORABLE NATHAN HECHT: -- flaky

1 limitations theory, but you know, there's some evidence of  
2 it, you know, I don't want to condition all the liability  
3 questions and damages in a two-week trial on some -- the  
4 answer to some question I'm not so sure they even get  
5 there.

6 HONORABLE STEPHEN YELENOSKY: Yeah. Well, I  
7 think Bill's right then. You can't have your cake and eat  
8 it, too. You either get a verdict that will guarantee you  
9 won't have a retrial or you have this problem. You  
10 already have this -- and you have this problem.

11 CHAIRMAN BABCOCK: That could be a theme,  
12 you can't have your cake, but, Judge Christopher, did you  
13 say that there were some things you want votes on?

14 HONORABLE TRACY CHRISTOPHER: Yes.

15 CHAIRMAN BABCOCK: Why don't you outline the  
16 first one and we'll vote? I'm in a voting mood.

17 HONORABLE TRACY CHRISTOPHER: The deletion  
18 of the description of the current case.

19 CHAIRMAN BABCOCK: Say that again.

20 HONORABLE TRACY CHRISTOPHER: The little --  
21 right at the very beginning, instructions to the panel  
22 before jury selection, the bracketed part that allows the  
23 judge to describe the current case.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE TRACY CHRISTOPHER: As I said,

1 it's not currently in 226a. It's in the bench book that's  
2 given to every judge, the little bracket, "description of  
3 the case," so we put it in here because a lot of judges do  
4 it, but the -- we had several people say delete it.

5 CHAIRMAN BABCOCK: Okay. Let's vote --

6 HONORABLE TRACY CHRISTOPHER: Or "optional."

7 CHAIRMAN BABCOCK: -- in the positive. How  
8 many people are in favor of having this description of the  
9 case included in the rule as proposed? Raise your hand.

10 How many against? Four in favor, 16  
11 against.

12 HONORABLE TRACY CHRISTOPHER: Okay.

13 CHAIRMAN BABCOCK: All right. Next.

14 HONORABLE TRACY CHRISTOPHER: Oh, Harvey's  
15 point about "Do not share your notes with other jurors,"  
16 do other people think that that is unclear and do we --

17 CHAIRMAN BABCOCK: What page are you on?

18 HONORABLE TRACY CHRISTOPHER: -- want to get  
19 more into just exactly how they can use their notes, more  
20 descriptive than what we're doing right now?

21 CHAIRMAN BABCOCK: What page? What page are  
22 we on?

23 HONORABLE TRACY CHRISTOPHER: It's  
24 instructions for the jury after it has been selected, it's  
25 No. 10.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE TRACY CHRISTOPHER: And I'm going  
3 to rewrite that one sentence to make it active.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE TRACY CHRISTOPHER: But the  
6 question is whether "Do not share your notes with other  
7 jurors" is confusing or should be clarified more, you  
8 know, what exactly does that mean and do we need to talk  
9 more about that idea.

10 CHAIRMAN BABCOCK: Okay. Justice Patterson.

11 HONORABLE JAN PATTERSON: And what do you  
12 intend it to mean? Is it do not show your notes? Because  
13 I presume that you can say, "Well, my notes reflect," but  
14 it's that additional step, isn't it, that we don't want to  
15 look?

16 HONORABLE TRACY CHRISTOPHER: Right.

17 HONORABLE JAN PATTERSON: "Here are my" --

18 HONORABLE TRACY CHRISTOPHER: That was what  
19 I was intending.

20 HONORABLE JAN PATTERSON: Right. That's  
21 what I thought, and I think that's what we discussed last  
22 time.

23 CHAIRMAN BABCOCK: Okay. How many -- yeah,  
24 Richard.

25 MR. ORSINGER: I've already been wrong on

1 the law today, as proven by that little Westlaw session we  
2 had, but my recollection of the original resistance to  
3 people -- jurors taking notes into the jury room was that  
4 one juror might resolve a disagreement about what a  
5 witness said by reading their notes of what they said.  
6 That's what I recollect the origin of the objection to  
7 notes, and so to me it's not just showing your notes to  
8 somebody, it's reading from your notes as if it's an  
9 authoritative record of what some witness said, and I  
10 think that "sharing" doesn't clearly prohibit that.

11 CHAIRMAN BABCOCK: So you would be in favor  
12 of more language?

13 MR. ORSINGER: Of spelling out that you're  
14 really not supposed to read your notes to others or allow  
15 them to see them.

16 CHAIRMAN BABCOCK: We got your vote in  
17 advance.

18 MR. ORSINGER: Oh, I'm sorry. I thought you  
19 were having a discussion.

20 HONORABLE STEPHEN YELENOSKY: I think there  
21 needs to be more on two points. One, and Elaine is  
22 pointing this out, is prior to deliberations you can't  
23 reveal what your notes are because then essentially you're  
24 talking about the case, and that's one thing. There needs  
25 to be more on that. Two is in the deliberations that

1 there not be given undue authoritative force to notes over  
2 a juror's own memory, which is essentially the instruction  
3 we give.

4 CHAIRMAN BABCOCK: Everybody that agrees  
5 that we should have more -- and Judge Christopher can work  
6 on what the more is, but should have amplification on the  
7 issue of notes, raise your hand.

8 Everybody that thinks the language as  
9 drafted is fine, raise your hand. By a vote of 17 to 3 we  
10 think we need more.

11 HONORABLE TRACY CHRISTOPHER: Okay. May  
12 I -- the one criminal court question that talks about  
13 note-taking, *Price vs. State*, specifically listed the  
14 instructions that they thought the criminal judges should  
15 give in a criminal case and what they have down here is,  
16 "Your notes are for your private use only. It is improper  
17 for you to share your notes with any other juror during  
18 any phase of the trial other than jury deliberations. You  
19 may, however, discuss the contents of your notes during  
20 your deliberations." Is that where we want to go or not  
21 go? I mean, do we want it to be just to refresh your own  
22 memory, or do we want to be able for people to say, "Well,  
23 you know, I'm reading from my note here." I mean, which  
24 way -- I'm glad to work on it. I just need to know which  
25 way we want to go.

1                   CHAIRMAN BABCOCK: Judge Yelenosky, then  
2 Richard Orsinger.

3                   HONORABLE STEPHEN YELENOSKY: Well, the  
4 instruction I give is that it's for your own use and  
5 shouldn't be shared and that what a juror -- or what a  
6 juror wrote down is no more important than the memory of  
7 another juror, and so it's slightly different from that  
8 because the only point in a juror saying "It's in my  
9 notes" is to give it additional weight and then the notes  
10 themselves essentially become this sort of meta-evidence.  
11 I know you can't prevent the jurors from looking at their  
12 notes and saying, "Well, what I remember --" but you can  
13 certainly try to de-emphasize this aura of correctness  
14 simply because somebody wrote it down.

15                   MR. MEADOWS: I agree with Richard to the  
16 point that if we're going to let someone look at their  
17 notes and say what their notes say, the other jurors ought  
18 to be able to see the notes really say that.

19                   CHAIRMAN BABCOCK: Richard.

20                   MR. ORSINGER: I'm not sure that I'm  
21 thinking of the right case, Judge, but if the Price case  
22 is the Court of Criminal case that I remember --

23                   HONORABLE TRACY CHRISTOPHER: Right.

24                   MR. ORSINGER: -- it was extremely  
25 controversial when it came down, and it was a plurality

1 opinion --

2 HONORABLE TRACY CHRISTOPHER: Oh, yeah, and  
3 then there's a footnote that says --

4 MR. ORSINGER: -- that the court  
5 subsequently disparaged. I think that there was a  
6 reconstituted court in an election shortly after that, as  
7 I recall. I think that's just a plurality opinion. I  
8 don't think it's stare decisis; and if it's the right case  
9 we shouldn't, I think, take it that that's the Court of  
10 Criminal Appeals precedent, if it's the case I'm thinking  
11 of; and having said that, maybe we ought to discuss  
12 whether we're comfortable with jurors saying what's in  
13 their notes and not just putting undue emphasis on it or  
14 whether we ought to prohibit people from reading their  
15 notes to --

16 HONORABLE STEPHEN YELENOSKY: Can I just  
17 respond to Bobby? What Bobby just said is exactly the  
18 problem. Then it becomes an issue of what the notes say.  
19 That's treating the notes as evidence.

20 MR. MEADOWS: That was my position last  
21 time, but I think I lost.

22 CHAIRMAN BABCOCK: Ralph.

23 MR. DUGGINS: Why couldn't you say, "You may  
24 refer to your notes, but not discuss or share them with  
25 other jurors"?



1 HONORABLE TRACY CHRISTOPHER: Well, what  
2 does "refer" mean?

3 HONORABLE STEPHEN YELENOSKY: Yourself.

4 MR. HAMILTON: Look at.

5 HONORABLE TRACY CHRISTOPHER: Look at,  
6 yourself?

7 CHAIRMAN BABCOCK: Judge Patterson.

8 HONORABLE TRACY CHRISTOPHER: Refresh your  
9 own memory, but don't quote from your notes?

10 HONORABLE JAN PATTERSON: I think that's  
11 almost -- once you allow notes I think it's almost  
12 impossible for a juror not to reference them and speak  
13 from them, but I think that the phrase "Do not rely on  
14 another juror's notes" has great weight and emphasis as in  
15 there. I would propose "Do not show your notes to other  
16 jurors. Do not rely on another juror's notes. Your  
17 memory shall control over any notes."

18 HONORABLE TRACY CHRISTOPHER: No. We took  
19 that out. We did vote to take that sentence out the last  
20 time we were here.

21 HONORABLE JAN PATTERSON: We did?

22 HONORABLE TRACY CHRISTOPHER: On your memory  
23 controls over your notes.

24 HONORABLE STEPHEN YELENOSKY: I don't  
25 remember that, but my notes say --

1 HONORABLE JANE BLAND: I thought --

2 (Multiple simultaneous speakers.)

3 CHAIRMAN BABCOCK: Hey, guys, guys. Hold  
4 on.

5 HONORABLE JANE BLAND: I thought we decided  
6 that we would be hospitable to juror note-taking, and part  
7 of that is also that the Legislature is looking toward  
8 being hospitable to juror note-taking, and the reason that  
9 we want to encourage or foster juror note-taking is  
10 because it's helpful to some jurors who can listen better,  
11 and if those jurors do take notes and can listen better by  
12 taking notes they certainly ought to be able to refer to  
13 them during jury deliberations and discuss them with their  
14 fellow jurors, and their fellow jurors can decide whether  
15 or not they find that juror's arguments persuasive or  
16 their notes to be a credible, you know, record of what the  
17 trial proceedings were like, but I don't think we should  
18 start saying you can take notes and then -- on the one  
19 hand and then on the other hand say you can't use them for  
20 anything.

21 HONORABLE JAN PATTERSON: Well, I think that  
22 next sentence, "Do not rely on another juror's notes" is a  
23 very strong one.

24 HONORABLE JANE BLAND: Yeah, I would have  
25 that out, but I can see that would probably not carry the

1 day here. Because I think what's wrong with other people  
2 relying on another juror's notes if they think it  
3 accurately reflects their memory of it and the juror says,  
4 "I've got it in my note," and they go, "Okay, you've got  
5 it in your note. That's what I think too. Good."

6 HONORABLE JAN PATTERSON: Then they're  
7 relying on their own memory as opposed to --

8 HONORABLE JANE BLAND: Well, but they're  
9 relying on their own memory as checked against somebody's  
10 notes, you know.

11 CHAIRMAN BABCOCK: Alistair.

12 MR. DAWSON: If you're going to allow  
13 note-taking, I think you ought to allow them to talk about  
14 it, read from their notes, show their notes to other  
15 people, and if you want to have the instruction in there  
16 that says -- from that case that says, you know, just  
17 because you've got notes doesn't mean that that overrides  
18 another juror's memory then that would be the appropriate  
19 way to handle it, but if we're going to let people take  
20 notes so that they can refresh their memories of what  
21 transpired during a trial, they ought to be able to have  
22 full use of them.

23 CHAIRMAN BABCOCK: You know, you're giving a  
24 lot of power to the note-takers if you do that, which may  
25 be --

1 MR. DAWSON: Otherwise I'm with Justice  
2 Bland. Why allow them to take notes and not use them?  
3 It's sort of a useless exercise.

4 CHAIRMAN BABCOCK: Well, you can use them  
5 for yourself, but --

6 MR. DAWSON: As a practical matter, "Well, I  
7 can't tell you what's on here, but let me just tell you  
8 that my recollection of the testimony" -- I mean, it's  
9 impractical.

10 HONORABLE STEPHEN YELENOSKY: Well, that's  
11 going to happen. The question is the person who has no  
12 memory, and there's somebody who has a memory and somebody  
13 who wrote it down, and the instruction is telling that  
14 juror you don't have to give any greater weight to the  
15 person who wrote it down.

16 MR. DAWSON: And I think that instruction's  
17 fine, so then if one juror says, "I remember he said the  
18 light was green" and the other one says, "My notes reflect  
19 that he said the light was red" then they as a group have  
20 to decide what they remember about the evidence.

21 CHAIRMAN BABCOCK: "I have a document to  
22 refresh your recollection. Here, let me show it to you.  
23 Justice Hecht, you don't remember this, but I wrote it  
24 down. Here, look, it's right here in black and white." I  
25 think that you can have some mischief there. Nina.

1 MS. CORTELL: What I would suggest is the  
2 next to last line just say, "Do not show or read your  
3 notes to other jurors," and I would delete the last line.  
4 I agree with Justice Bland on that. Take out "do not  
5 rely." I think as a practical matter once the notes are  
6 in there and they're allowed to consider them during  
7 deliberations, how do you -- we're trying to parse it too  
8 quickly. It will filter through in their comments and  
9 deliberations. I don't think we can control that, but we  
10 can control, or arguably anyway, through an instruction  
11 that they not actually show or read their notes directly.

12 CHAIRMAN BABCOCK: Okay. Any other  
13 discussion on this? Elaine.

14 PROFESSOR CARLSON: Did you have a chance to  
15 look at either the ABA study on the jury initiative or the  
16 national state court study? Because I know there was a  
17 lot -- about three years ago there was some very  
18 well-funded I think it was partly empirical studies but  
19 also analysis of the modern day role of the jury, and I'm  
20 just curious how they came out on this question, because I  
21 know it involved the use of jury notes as well as other  
22 things.

23 HONORABLE TRACY CHRISTOPHER: No. I do have  
24 a prior proposal from I think some State Bar committee  
25 back in '97, but I haven't looked at any of the model

1 ones, and some of the language that they had was your  
2 notes -- "You may use your notes to refresh your memory.  
3 The notes are not evidence. The notes should not be  
4 considered any more accurate than the memory of a juror  
5 not making notes."

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE TRACY CHRISTOPHER: Are some of  
8 the concepts that they put in.

9 CHAIRMAN BABCOCK: Yeah, Carl.

10 MR. HAMILTON: Was that the thing that I  
11 sent to you?

12 HONORABLE TRACY CHRISTOPHER: Yes. Was that  
13 State Bar?

14 MR. HAMILTON: Yeah. Because back in '97  
15 Judge Hart here in Austin --

16 CHAIRMAN BABCOCK: Right.

17 MR. HAMILTON: -- came to the committee and  
18 wanted us to try to put together a set of rules on  
19 note-taking, and he had some rules that he followed in his  
20 court that he thought worked very well, and he thought the  
21 whole state ought to do it, so we put together a set of  
22 rules and sent them up here, and I'm glad that she found  
23 those because I've had my secretary looking for them and  
24 we can't find them.

25 CHAIRMAN BABCOCK: Alex, did you have your

1 hand up?

2 PROFESSOR ALBRIGHT: Yeah, I was wondering  
3 if we needed to repeat some instructions about notes when  
4 they go back for deliberation. We only talk about notes  
5 when they're beginning the trial.

6 HONORABLE TRACY CHRISTOPHER: No, we repeat  
7 them at that second paragraph at the beginning of the  
8 charge.

9 PROFESSOR ALBRIGHT: Oh, oh, okay. I see.

10 HONORABLE TRACY CHRISTOPHER: Only I  
11 shortened it.

12 PROFESSOR ALBRIGHT: I didn't see it. Thank  
13 you. I think that's good.

14 CHAIRMAN BABCOCK: Justice Bland.

15 HONORABLE JANE BLAND: Well, I would be  
16 receptive to something that Alistair suggested about, you  
17 know, instructing them that a juror's memory can be --  
18 jurors' memories can be comparable whether or not they've  
19 taken notes, like the Court of Criminal Appeals  
20 instruction, because I think that gets to the concept that  
21 people are worried about that somebody's going to, you  
22 know, knock somebody over the head if their memory  
23 disagrees with, you know, another juror's notes, but then  
24 that lets it all get aired out. I think, you know, you  
25 shouldn't -- you shouldn't put -- you shouldn't suggest

1 that note -- a note-taker has more weight in the jury room  
2 than a non-note-taker, but you also shouldn't suggest that  
3 a note-taker has less weight than the other jurors.

4 CHAIRMAN BABCOCK: Yeah, that's true, but as  
5 a practical matter don't you think that the note-taker is  
6 going to have an advantage over -- not the strong juror,  
7 but the one who's kind of, "Oh, I don't know"?

8 HONORABLE JANE BLAND: Well, why would that  
9 be, though, Chip, unless that juror puts confidence in the  
10 note-taker and that what the note-taker has done is a fair  
11 depiction of the evidence?

12 CHAIRMAN BABCOCK: Because it's another  
13 weapon.

14 HONORABLE JANE BLAND: So it might be a  
15 fair -- you know, if there's a bias it might be a fair  
16 bias, but if a juror writes down a bunch of lies, I don't  
17 think the other jurors are going to go along with it.

18 CHAIRMAN BABCOCK: Well, it depends. I  
19 mean, hopefully no juror would intentionally write down  
20 things that didn't happen, but it is another weapon for  
21 that juror, you know, a piece of paper. "I have not only  
22 my memory, but I've got a piece of paper, and I want to  
23 convince you that I'm right, and you don't have to believe  
24 what I say. Just look at what I wrote, because I wrote it  
25 down exactly as it happened," and that's a big weapon for



1 that juror, and, you know, it could be proplaintiff, could  
2 be prodefendant, you don't know, but that really gives a  
3 juror some advantage, I think, but maybe not.

4 MR. GILSTRAP: Let's vote on it. Why don't  
5 we vote on it?

6 CHAIRMAN BABCOCK: Yeah. What are we voting  
7 on?

8 MR. ORSINGER: What are the choices?

9 MR. WADE: What's the question?

10 MR. GILSTRAP: One vote is that the juror  
11 can take notes and use the notes to refresh his own  
12 recollection but he can't, you know, read, comment, talk  
13 about the notes to other jurors. The other vote is that  
14 the jurors can share their notes.

15 CHAIRMAN BABCOCK: Okay. That would be a  
16 good thing. So that would be helpful, Judge Christopher?

17 HONORABLE TRACY CHRISTOPHER: Sure.

18 CHAIRMAN BABCOCK: All right. Everybody  
19 that is in favor of allowing jurors to use their notes in  
20 the deliberations, share them with other jurors.

21 HONORABLE JANE BLAND: Wait a minute.  
22 "Share" is the word I'm tripping up on. I don't believe  
23 that they ought to be able to pass around a copy of their  
24 notes. You know, like I don't have any problem with what  
25 we have right here, "Do not share your notes with other

1 jurors," but I thought what we were talking about doing  
2 was something more restrictive, like --

3 MR. GILSTRAP: Discussing them.

4 HONORABLE JANE BLAND: -- that you can't  
5 discuss what your notes say and you can't consult your  
6 notes while you're deliberating, you can't check your  
7 notes to verify facts.

8 HONORABLE TRACY CHRISTOPHER: Or what about  
9 reading your notes?

10 HONORABLE JANE BLAND: Or read your notes if  
11 they show something about what you think the witness said.

12 MR. GILSTRAP: Justice Bland I think you're  
13 mixing two things. I mean, the juror can consult his own  
14 notes and he can look at his own notes. He just can't --  
15 but the question is can he read from the notes or discuss  
16 the notes with someone else. I mean, I think that's the  
17 point of disagreement.

18 HONORABLE JANE BLAND: But I don't see the  
19 difference between consulting his notes and then talking  
20 about them and what you were just talking about, which was  
21 reading his notes and discussing them. I think that's the  
22 same thing.

23 MR. GILSTRAP: Well, it's the communication  
24 of the -- the existence and the contents of the notes that  
25 I think we're disagreeing over.

1 HONORABLE JANE BLAND: But if you're letting  
2 somebody consult their notes are you saying they can  
3 consult their notes but not say what they wrote?

4 MR. GILSTRAP: Yes, that's what I'm saying.  
5 I think that's what the point of disagreement is.

6 MR. ORSINGER: Well, I think there's a  
7 different option, too, which is the one that I'm attracted  
8 to, which is that people can talk about the notes, but we  
9 should say that the fact that they've written it down  
10 doesn't make their notes any more important than their  
11 memory or anyone else's memory, because as a practical  
12 matter they could very easily communicate the content of  
13 their notes without saying they're quoting it, but just  
14 actually be quoting it. I think probably we can't stop  
15 that, but what we could stop is we could bolster the  
16 people who might otherwise put too much weight on  
17 something that someone wrote down by saying that the mere  
18 fact that someone has written it down doesn't give it any  
19 greater weight than what you might remember.

20 CHAIRMAN BABCOCK: Well, that's back to what  
21 Judge Patterson said sometime ago, which is that sentence,  
22 "Do not rely on another juror's notes" as a powerful --

23 MR. ORSINGER: Well, I think that  
24 alternative should be included in the vote, because I'm  
25 attracted to that better than either of the completely in

1 or completely out.

2 CHAIRMAN BABCOCK: Well, yeah, Elaine.

3 PROFESSOR CARLSON: Chip, how does this all  
4 interface with Rule 287, which says if the jury disagrees  
5 on the testimony of a witness then the court reporter is  
6 supposed to read back the notes after they tell the court  
7 or bring the witness back if the --

8 CHAIRMAN BABCOCK: Whose notes?

9 PROFESSOR CARLSON: The court reporter's  
10 notes. Does this do away with that or --

11 MR. ORSINGER: No.

12 CHAIRMAN BABCOCK: I don't think so. I  
13 don't think as a practical matter it does.

14 PROFESSOR CARLSON: So let's say the jurors  
15 are in there disagreeing about the testimony of a witness.  
16 Do they still -- how do they know, well, we can get the  
17 court reporter's notes read back to us as opposed to "What  
18 do your notes say?"

19 CHAIRMAN BABCOCK: Yeah. I mean, I think  
20 that could ameliorate it, but not necessarily.

21 MR. ORSINGER: Well, we don't want -- we  
22 don't want one juror's notes to replace -- to be the way  
23 to solve that dispute.

24 PROFESSOR CARLSON: That's what I'm saying.

25 CHAIRMAN BABCOCK: Right.

1 MR. DUGGINS: Couldn't you add that, a  
2 comment that in the event of disagreement over testimony  
3 you have the right to ask for the --

4 MR. GILSTRAP: But we don't want them doing  
5 it. That's the reason it's not in there.

6 MR. ORSINGER: Yeah, they have that right  
7 and we never tell them because we don't want them to  
8 exercise it.

9 HONORABLE JAN PATTERSON: I have a motion.

10 MR. DUGGINS: Well, I'm just saying.

11 CHAIRMAN BABCOCK: Judge Patterson has a  
12 motion. I like those.

13 HONORABLE JAN PATTERSON: I have motion. I  
14 think that the word "share" is ambiguous and we either  
15 need to say --

16 HONORABLE STEPHEN YELENOSKY: Show.

17 HONORABLE JAN PATTERSON: -- "show" and  
18 "share" and all of that or not, but my motion is that we  
19 say the first and third sentences and just leave out the  
20 "do not share any notes" -- so that it would read, "Any  
21 notes you take are for your own personal use and may be  
22 taken back in the jury room and consulted during  
23 deliberations. Do not rely on another juror's notes," and  
24 leave out the sentence, "Do not share." That way they're  
25 for your own use, you can consult them, and you're not to

1 use somebody else's.

2 HONORABLE STEPHEN YELENOSKY: But it's  
3 missing the part that you shouldn't -- at least prior to  
4 deliberations I think everyone would agree you shouldn't  
5 be showing your notes because that is essentially allowing  
6 deliberations to begin before deliberations should.

7 HONORABLE TRACY CHRISTOPHER: Right. Yeah.  
8 That was the purpose of this. I always tell them, you  
9 know, if you show somebody or if you shared your notes  
10 with somebody it would be just like you were talking about  
11 the case.

12 HONORABLE STEPHEN YELENOSKY: So we need  
13 something on that.

14 HONORABLE TRACY CHRISTOPHER: Because this  
15 is actually pre-. This is before the trial starts.

16 CHAIRMAN BABCOCK: Justice Bland, what if we  
17 phrase the vote slightly differently and rather than get  
18 the "share" language what if we phrase the vote as how  
19 many people feel that the jurors should only be able to  
20 use the notes for their own personal use and for no other  
21 use?

22 MR. HAMILTON: To refresh their own memory.

23 HONORABLE JAN PATTERSON: Okay. That's  
24 true.

25 CHAIRMAN BABCOCK: I'm not saying how that

1 ought to come out. I'm just saying what if we voted on  
2 that?

3 MS. CORTELL: I don't understand that,  
4 because if I use them for my own personal use but then I  
5 express my views in the jury room --

6 HONORABLE TRACY CHRISTOPHER: Am I violating  
7 the rule?

8 MS. CORTELL: -- I'm transcending that, so  
9 that's not helpful, I don't think.

10 CHAIRMAN BABCOCK: Well, yeah, the concept I  
11 was trying to get at was, look, if I'm taking notes and  
12 I'm sitting back there and I can't remember, you know,  
13 since Munzinger is saying, "Oh, I remember that testimony.  
14 He said this and this and this." And I go, "I can't  
15 remember what it says. Wait a minute. Oh, yeah, he says  
16 such and such. No, Munzinger, I don't agree with that.  
17 My recollection is different from yours."

18 Now, that's one way to resolve it, but then  
19 could you go the other step and say, "And, Munzinger, come  
20 here, look at this, and I wrote down right here exactly  
21 what this guy said. So you're wrong and I'm right."  
22 Those are two different situations. The first, I'm just  
23 using it to refresh my own recollection. The second I'm  
24 trying to use it to change his.

25 PROFESSOR HOFFMAN: Chip, can I suggest that

1 prescriptions of what they can do with their notes are  
2 hard to phrase because of these differences, and so my  
3 suggestion instead we use language such as this that I  
4 think gets at what we've been trying to say and several of  
5 us have said. I would put something that says something  
6 along these lines: "Just remember," or "take note."

7 CHAIRMAN BABCOCK: "Hey, you."

8 PROFESSOR HOFFMAN: "Neither your notes nor  
9 anyone else's notes are evidence, nor are they more  
10 authoritative than another juror's memory."

11 HONORABLE STEPHEN YELENOSKY: Except that  
12 word is too big, "authoritative."

13 PROFESSOR CARLSON: "Nor are they to be  
14 given greater weight."

15 PROFESSOR HOFFMAN: Great. So fix that.  
16 But what it's doing, instead of admonishing them don't do  
17 this, do this, just we're telling them what I think all of  
18 us have said.

19 MR. JEFFERSON: Second.

20 MR. GILSTRAP: That's step two. The first  
21 step is don't communicate what's in your notes.

22 PROFESSOR HOFFMAN: Agreed.

23 MR. GILSTRAP: The second step is, okay, if  
24 you communicate what's in your notes, don't give that any  
25 more credibility than anything else. The third thing is I



1 guess something beyond that.

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. MUNZINGER: The reality is what Chip  
4 just gave as the example. If you tell a guy, "You can't  
5 share your notes," the person is going to share the notes  
6 implicitly by conduct or in some other way. If you're  
7 going to let people take notes they're going to use the  
8 notes during the deliberations. It's inevitable, and to  
9 pretend that they won't is -- I mean, my god, after some  
10 of the questions she's read that they've gotten, they're  
11 not going to pay attention to something that says you  
12 can't use notes. Why would you take notes if you can't  
13 use them?

14 PROFESSOR HOFFMAN: And, Richard, that's why  
15 I say let's not get hung up on what are we exactly  
16 admonishing them to.

17 MR. MUNZINGER: I agree.

18 PROFESSOR HOFFMAN: Let's just be clear  
19 about that -- you know, try to make -- put it in the  
20 forefront of their mind that the notes are not evidence  
21 and they're not any more authoritative than anyone else's  
22 memory, and if we do that I think we accomplish what  
23 concerns us.

24 MR. MUNZINGER: I agree with that. I think  
25 it has to be very strong that because someone has taken a

1 note or read a note has no more weight than somebody  
2 else's memory, or however we phrase it, but I agree with  
3 you.

4 CHAIRMAN BABCOCK: That's been seconded.

5 MR. JEFFERSON: Yes.

6 CHAIRMAN BABCOCK: I don't know if that's in  
7 the form of a motion to vote on something.

8 PROFESSOR HOFFMAN: It was. It was.

9 CHAIRMAN BABCOCK: But I'm in a very voting  
10 mood.

11 HONORABLE TRACY CHRISTOPHER: Can I just  
12 bring in one little wrinkle? Now that everyone has a copy  
13 of the charge, lawyers often in closing arguments are  
14 saying "Write this down," you know, "Here's the number you  
15 need to fill in this blank, write it down."

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE TRACY CHRISTOPHER: "If you just  
18 want to award them the emergency room bills, that number  
19 is \$222.35," and they're sitting there writing it down.  
20 Now, is that a note?

21 MR. ORSINGER: Uh-huh. Sure.

22 HONORABLE TRACY CHRISTOPHER: Subject to  
23 this same restriction?

24 MR. ORSINGER: Yes.

25 HONORABLE TRACY CHRISTOPHER: I don't think

1 jurors would think that. I don't think they would think  
2 that's a note.

3 HONORABLE STEPHEN YELENOSKY: Well, my  
4 proposal, given everything that's been said, is to have a  
5 black and white rule on showing notes. "You should not at  
6 any time show your notes to another juror," and then that  
7 takes care of predeliberation, when I think we all agree,  
8 and then during deliberation at least it keeps people from  
9 treating the piece of paper as a piece of evidence, and if  
10 they're going to share their notes it's because they're  
11 reading from them or talking about them, and then add the  
12 admonition that it shouldn't be considered any more -- but  
13 I do think we need to keep them from showing notes, at  
14 least before deliberation.

15 CHAIRMAN BABCOCK: We're going to vote on  
16 Lonny's proposal that's been seconded. You want to read  
17 it again?

18 PROFESSOR HOFFMAN: Yeah. So I would put  
19 into this some language, and I would take out some others  
20 about what we admonished them, but that part I'm not so  
21 clear about, but I would add something like this: "Just  
22 remember neither your notes nor anyone else's notes are  
23 evidence, nor are they" -- "nor should they be given any  
24 more weight than another juror's memory."

25 CHAIRMAN BABCOCK: Okay. Everybody in favor

1 of that raise your hand.

2 HONORABLE STEPHEN YELENOSKY: And that and  
3 nothing more?

4 MR. GILSTRAP: Are we saying that and  
5 nothing more or just that?

6 HONORABLE STEPHEN YELENOSKY: Because that  
7 doesn't have "do not show notes."

8 PROFESSOR HOFFMAN: So in paragraph 10 I  
9 would suggest it say something like this, though I have a  
10 little play in the joints, but something like this:  
11 "During the trial if taking notes will help focus your  
12 attention, go for it. If taking notes will distract you,  
13 don't do it. Any notes you take are for your own use and  
14 may be taken back to the jury room and consulted." I  
15 would then delete that next sentence and then I would say,  
16 "Don't rely on another juror's notes," and then finally,  
17 "Just remember" and what I just said.

18 PROFESSOR CARLSON: But doesn't that really  
19 go in the charge part?

20 PROFESSOR HOFFMAN: Maybe.

21 PROFESSOR CARLSON: As Stephen said, during  
22 the evidentiary part of the trial you can take notes, but  
23 don't discuss this case until the court retires you to  
24 deliberate --

25 CHAIRMAN BABCOCK: Well, for whatever -- you

1 can vote against Lonny's proposal --

2 PROFESSOR CARLSON: Okay. Okay.

3 CHAIRMAN BABCOCK: -- for whatever reason.

4 So everybody that's in favor of Lonny's proposal, raise  
5 your hand.

6 All right. Everybody opposed? That passes  
7 by a vote of 17 to 4, the Chair not voting, so that was  
8 helpful. Thanks.

9 MR. MUNZINGER: May I make a motion?

10 CHAIRMAN BABCOCK: Yes.

11 MR. MUNZINGER: I think that you should  
12 include -- I move that we include Judge Yelenosky's  
13 proposal that the jurors be specifically told that their  
14 notes are not be shown to another juror and that that  
15 portion of the instructions be carried forward into the  
16 charge of the court.

17 CHAIRMAN BABCOCK: Okay. Everybody in favor  
18 of that raise your hand.

19 MR. STORIE: May I offer an amendment?

20 CHAIRMAN BABCOCK: In a minute.

21 MR. STORIE: Okay.

22 CHAIRMAN BABCOCK: How many opposed to that?  
23 That passes by 13 to 6. Gene, what's the amendment?

24 MR. STORIE: "Or read."

25 CHAIRMAN BABCOCK: "Or read." Do you accept

1 that amendment?

2 HONORABLE STEPHEN YELENOSKY: It's his  
3 amendment.

4 MR. MUNZINGER: That's fine. I agree to the  
5 amendment.

6 CHAIRMAN BABCOCK: Okay. Judge Christopher,  
7 how many more votes do we have? And the reason I'm asking  
8 is we haven't taken our afternoon break. Some people have  
9 been able to get up and do what you do on breaks, but the  
10 Chair has not been able to.

11 HONORABLE TRACY CHRISTOPHER: Actually, that  
12 was the last thing I needed a vote on.

13 CHAIRMAN BABCOCK: Ahh, now we're talking.  
14 Well, it doesn't sound like there's any other business on  
15 the table, but you'll bring all of this back to us next  
16 time.

17 HONORABLE TRACY CHRISTOPHER: Along with  
18 bias and prejudice. That will be a fun day.

19 CHAIRMAN BABCOCK: Along with bias and  
20 prejudice.

21 HONORABLE STEPHEN YELENOSKY: Chip, did you  
22 talk about the certificate?

23 CHAIRMAN BABCOCK: Yeah, we did. Sorry. We  
24 flipped the other thing and did it ahead of time.

25 HONORABLE STEPHEN YELENOSKY: All right.

1                   CHAIRMAN BABCOCK: Well, this has been a  
2 really productive session today. Thanks, everybody.

3                   HONORABLE NATHAN HECHT: Well, let me say  
4 something.

5                   CHAIRMAN BABCOCK: Oh, Justice Hecht has a  
6 comment. Oh, yeah, you didn't get to give your report.  
7 Here's Justice Hecht's report.

8                   HONORABLE NATHAN HECHT: Let me just say two  
9 things. We changed the amendments to the appellate rules  
10 slightly in several respects before the final version was  
11 adopted. So if you worked with the published draft, the  
12 draft that was published in the spring, which I think is  
13 already in the West pamphlet, you'll want to take a look  
14 at the real rules that went out because in some respects  
15 they're different. The only rule that is completely  
16 different is the accelerated appeals/interlocutory appeal  
17 rule.

18                   HONORABLE JAN PATTERSON: No more allowed,  
19 right?

20                   HONORABLE NATHAN HECHT: I'm sorry?

21                   HONORABLE JAN PATTERSON: No more allowed.

22                   HONORABLE NATHAN HECHT: Well, no, we were  
23 trying to -- the committee was trying to deal with the  
24 problem that people do not realize that the appeal is  
25 accelerated, so they wait too long, and they --

1                   CHAIRMAN BABCOCK: Lose.

2                   HONORABLE NATHAN HECHT: -- lose their  
3 rights. So we were -- we wrote the rule to say no matter  
4 what a statute says you've got 20 days. So then we have  
5 to list all the statutes that we're repealing, so we  
6 started making a list, and there's a big long list, and  
7 then it became clear to us that some of these probably  
8 couldn't be changed. For example, there is a rule --  
9 there is a statute that requires appeals in challenges in  
10 primary elections to be done within five days.

11                   So we called the Secretary of State's office  
12 and said would they mind if we change this to 20, and they  
13 said, yes, they would, that this would wreck the whole  
14 plan, and so then we got to thinking maybe there are some  
15 others like this. So we called Will Hartnett's committee  
16 to see if this was something they were concerned about and  
17 would work with us on to try to solve the problem, and  
18 they said "yes." So we revised the rule to where it goes  
19 the other way and says you get 20 days unless the statute  
20 tells you something else, and then you have to do what the  
21 statute says. So that really doesn't solve the problem.  
22 It leaves it out there, and I think it's a big problem,  
23 but I don't see any other way of solving it.

24                   CHAIRMAN BABCOCK: Well, and on the election  
25 thing, I think we discussed that there are good reasons --



1 HONORABLE NATHAN HECHT: Yes.

2 CHAIRMAN BABCOCK: -- to have a five-day.

3 MR. GILSTRAP: But at least it's in the rule  
4 now. At least when you read the rule you know there might  
5 be some statute out there. You didn't know that before.

6 HONORABLE NATHAN HECHT: Yeah. And  
7 eventually even if we leave the rule like it is and we  
8 don't get any -- even if nothing changes, we probably will  
9 go in at some point and try to list the statutes so that  
10 people will be aware at least that this is a problem.

11 And otherwise, those rules, there were some  
12 major edits in places, but that was the big change, and  
13 then the Bar -- you may know this or maybe you don't. If  
14 you give the State Bar of Texas your personal contact  
15 information, like your residence address and telephone  
16 number, until the last session of the Legislature there's  
17 a question about whether that information must be produced  
18 in an open records request, either with respect to the  
19 lawyer individually or maybe with respect to the whole  
20 Bar, and so in the last session the Legislature changed  
21 the Public Information Act to say that it's confidential  
22 if the lawyer designates it as confidential.

23 The Bar adopted a rule that did the  
24 opposite, that says it's confidential unless you say it's  
25 public, so they shifted the default position, and the

1 Court has not adopted that rule and has sought an  
2 explanation from the Bar why they think the default  
3 position can be shifted. Meanwhile, there's a case  
4 pending that's in our court, actually, about what --  
5 whether the information was public under the law before  
6 the amendment in the last session. And then I think  
7 that's all the major things that I haven't mentioned.

8 And I hope everybody met Kennon Peterson.

9 CHAIRMAN BABCOCK: Yep, I took care of that.

10 HONORABLE NATHAN HECHT: Okay. Great. And  
11 you lauded her sufficiently?

12 CHAIRMAN BABCOCK: I don't know if  
13 sufficiently, but there was some plaudits. Maybe not as  
14 good as you would have wanted to do it.

15 MR. ORSINGER: Some of us didn't get to hear  
16 it.

17 CHAIRMAN BABCOCK: All right. Anything  
18 else?

19 HONORABLE NATHAN HECHT: No, sir.

20 CHAIRMAN BABCOCK: Any other business?

21 We're recessed. Thanks, everybody. Oh, the next meeting  
22 is November 21 and 22. November 21 and 22.

23 (Meeting adjourned at 3:55 p.m.)

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2 **REPORTER'S CERTIFICATION**  
 3 **MEETING OF THE**  
 4 **SUPREME COURT ADVISORY COMMITTEE**

5 \* \* \* \* \*

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 7  
 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 5th day of September, 2008, and the same was  
 12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my  
 14 services in the matter are \$ 1,912.50 .

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on  
 17 this the 24th day of September, 2008.

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