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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 27, 2007

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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 27th
day of April, 2007, between the hours of 9:01 a.m. and
4:51 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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TRAP 38.1	15839
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Documents referenced in this session

07-5 Rocket Docket, subcommittee report (4-26-07)

07-6 Memo from Prof. Dorsaneo, TRAP changes (4-25-07)

07-7 Letter from Gilstrap, proposal to amend garnishment rules (4-19-07)

07-8 Rules affected, service of writs of garnishments by private process

07-9 Proposed amendment to Rule 226a (two drafts)

07-10 Proposed amendment to Rule 904 (4-20-07)

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1 are helping them and then kind of look over their
2 recommendations toward the end of that process. So I
3 think that will probably be in the fall if that bill
4 passes, but it's quite a lot of work to allow e-filing in
5 all these justice courts. What are there, four hundred
6 and some of them?

7 HONORABLE TOM LAWRENCE: 830.

8 HONORABLE NATHAN HECHT: 830, and they do
9 things, as you might expect, in 254 counties a lot
10 differently around the state. Otherwise, that's all we
11 know, right?

12 MR. HUGHES: Yeah. There are other ones
13 that could pass, but it's hard to say at this point.

14 HONORABLE NATHAN HECHT: Yeah. There are
15 several other things, but the big court restructuring bill
16 has been pared down quite a bit, and I don't know whether
17 there will be any rules involved in that.

18 CHAIRMAN BABCOCK: Is that Senate Bill 1204?

19 HONORABLE NATHAN HECHT: Yeah.

20 CHAIRMAN BABCOCK: I know Judge Christopher
21 and I gave a talk at the Houston Bench/Bar Conference and
22 I spoke about the Court's impending rules on electronic
23 access to court files. Any update on that?

24 HONORABLE NATHAN HECHT: We've pretty well
25 worked through the sensitive data rule, although, we would

1 still like to solicit some input from the people in the
2 trench, the clerks and others, about it; and we have not
3 finished work on the internet part of the rule. I think
4 there's been some consternation up in Tarrant County about
5 their filing. I think the judges and the commissioners
6 are at odds or something, and so we're just -- we're
7 moving along, but sort of cautiously.

8 CHAIRMAN BABCOCK: Very good. On Senate
9 Bill 1204, we received a lengthy letter and memo from
10 Frank Branson, who, as most of you know, is a lawyer who
11 practices predominantly on the plaintiff's side of the
12 docket from Dallas, and did we put this on the website,
13 Angie?

14 MS. SENNEFF: No.

15 CHAIRMAN BABCOCK: We probably should.
16 Maybe we ought to call and make sure he knows it will be
17 widely disseminated, but it's very thoughtful. It may
18 have been overstripped by events now because it's a couple
19 of weeks old, but it's interesting reading. I don't think
20 there's anything for us to do with respect to it, other
21 than it's just -- it's just interesting. Anything else
22 that we need to talk about?

23 HONORABLE NATHAN HECHT: I think that's it.

24 CHAIRMAN BABCOCK: All right. Well, let's
25 get into today's agenda. I don't know if you-all have had

1 a chance to see the work that Jeff Boyd and his
2 subcommittee did. It was just posted yesterday, day
3 before, yesterday, but it's terrific work, Jeff, and if
4 you could fill us in.

5 MR. BOYD: Sure. Thank you. The
6 legislative mandates subcommittee has been focused on what
7 we call the rocket docket issue, and there is a written
8 report that was posted yesterday, and I believe copies are
9 available. If you don't have one, it would be useful for
10 everybody to have a copy of the report so we don't have to
11 read everything that's in there in order to get the
12 message across, but you may recall that we last addressed
13 this full committee on this issue was at the December
14 meeting and there really kind of focused on the
15 preliminary work we had done and what we understood our
16 charge to be; and after good discussion from this group
17 and guidance from Justice Hecht, one of the things we went
18 back and did since then was to reconsider our charge and
19 find a different way of expressing what we now understood
20 our charge to be as a subcommittee on this rocket docket
21 issue; and so I want to spend just a few minutes telling
22 you how we understand that to be and allow for your input
23 and comment on that and then describing what we've done as
24 we've addressed what we've identified as the three tasks
25 or issues that we see involved in this process, the first

1 one of which is based on our charge we thought it would be
2 useful to go back and try and identify what could be the
3 problem or problems that a rocket docket would be intended
4 to solve and how do those problems manifest themselves
5 within the Texas court system. We'll talk a little more
6 about that today.

7 The second task or issue was a more in-depth
8 review of literature, articles from law reviews, law
9 journals, bar journals, other places, a more in-depth
10 review of those to identify and sort of categorize various
11 rules, procedures, factors, that other jurisdictions who
12 have implemented rocket dockets or similar processes have
13 used, and so that we'll talk a little about today as well,
14 and then our third step in the process, depending on where
15 we go after today and how we choose to go there, having
16 focused on understanding whether there's a problem and, if
17 so, what is the problem, and then looking at what others
18 have done to address that problem or similar problems,
19 then really focusing on what we would be recommending
20 Texas do in the way of implementing any kind of rocket
21 docket.

22 That third step, actually recommending as to
23 what Texas would do, we've still postponed getting there
24 because we want to make sure we know what the problem
25 we're trying to address and how others have successfully

1 or unsuccessfully addressed it before we start getting
2 there. So with that kind of overview of what we'll talk
3 about today, we'll start with our charge, and the
4 subcommittee's charge as we perceive it -- and it's much
5 like what we discussed in December, the charge of
6 exploring, evaluating, and advising this committee on
7 whether and how the implementation of a rocket docket or
8 fast track proceeding could reduce costs and delays within
9 the Texas state court system and to make recommendations
10 to this committee on how that proceeding could be
11 implemented within the Texas courts and how it would work
12 and make recommendations on the benefits and liabilities
13 of such a system in Texas.

14 That's very similar to what we understood
15 our charge to be in December, except that you'll recall at
16 that point it was articulated within the context of the
17 attention that was being given to the vanishing jury trial
18 concept, vanishing tort filings, vanishing jury trials;
19 and we left that meeting in December with the
20 understanding, though, we were to make things simpler, if
21 for no other reason -- forget about vanishing jury trials,
22 just look at the question of whether a rocket docket, if a
23 rocket docket were implemented in the Texas courts, what
24 would be the pros and cons and particularly within the
25 context of cost and delay; and so we really began focusing

1 on the idea if there's a purpose for a rocket docket, you
2 want to design that system to address an issue or to
3 either solve a problem or improve a factor in the process
4 and what would that be; and so we began inherently sort of
5 thinking it was a matter of -- the purpose of an expedited
6 fast track system was to reduce delays within the system;
7 and so that's really how we characterize the purpose for
8 our focus, is on delay and cost within the system; and
9 we've omitted any effort on our part to try and understand
10 or evaluate this vanishing jury trial phenomenon or how it
11 relates to the rocket docket, so we can spend time
12 discussing that if necessary.

13 The one issue within our charge that came up
14 was whether and the extent to which we ought to be looking
15 at and perhaps making recommendations on some form of
16 rocket docket or fast track system within the appellate
17 courts; and as you know, there are already some rules that
18 address expedited appeals in particular circumstances;
19 but, so, in fact, we contacted both Chip and Justice Hecht
20 and said, "Do you see a need for -- is this an area that
21 you want us to consider"; and their response, was, "Yeah,
22 while you're looking at it, you should look at this as
23 well"; but we thought that might be worth some time for
24 discussion today as well. So that's kind of where we are
25 and what we see our charge as being.

1 As I say, we then turned and focused on
2 trying to gather information to help understand, if the
3 purpose here is to address issues with cost and delay of
4 litigation, what are those issues? And so we focused then
5 on gathering data to address that, and the report provides
6 information about that, and I'm going to let Pete
7 Schenkkan really go over that process and the results of
8 that process and then we'll come back to talking about
9 summarizing what we've seen in other jurisdictions who
10 have implemented rocket docket systems.

11 MR. SCHENKKAN: Sure. Of the three possible
12 reasons for the court system to lose business to
13 alternative dispute resolution systems, delay, costs, and
14 perceived arbitrariness and risks of outcomes, the rocket
15 docket appeared like it might be or might not be a good
16 solution to two of them, delay and cost; and so we were
17 looking for data on that; and we went to the Office of
18 Court Administration, a government agency of the State of
19 Texas which has been collecting data, maintaining data
20 reported by the district clerks of the counties for 25
21 years, and got their data in a database form that goes
22 back to '93; and it's possible to get some of the same
23 data in a different way farther back; and the data itself
24 is in your packet, starting with Exhibit A, looks like
25 this, to see what they -- what the data that's available

1 shows; and Exhibit A appears to us to show a modest
2 statewide trend in district courts, civil cases, of less
3 delay.

4 If you measure it by the disposition time
5 that takes more than 18 months and the first number of
6 years covered in this table, it was at 23 to 24 percent,
7 and in the last several years it's been 19 to 20 percent;
8 and there's been a reduction as well in the next category
9 or the next oldest category that they collect the data on,
10 12 to 18-month category from the 10 to 12 percent range to
11 the 9 to 10 percent range; and there's been conversely an
12 increase in the very rapid disposition category, the three
13 months or less category, from 27 percent or so to the 32,
14 33 percent.

15 So the statewide data do not suggest -- at
16 this aggregate level do not suggest that we have a
17 worsening problem of overall delay in civil cases in
18 district courts. We have to qualify this by saying that
19 they only have this disposition data, this time to
20 disposition data by these big groups of cases, in this
21 case civil cases in district courts, and there are, of
22 course, many different kinds of civil cases. At the end
23 of this report you have an exhibit that is one of their
24 actual reports, starts with this, the one that says
25 "Exhibit C" and has some columns you can't read that are

1 grayed out alternating with columns you can read, and this
2 gives you -- shows you what the reports look like that
3 this data comes from, and you will see in there that there
4 is a category "divorce" and then to the immediate right of
5 it there is a category, "all other family matters" is
6 gray, very hard to read, and those two categories between
7 them account for 350,000 of the dispositions during this
8 time period that this particular report covered out of a
9 total of 550,000 and thus, you could perfectly well have,
10 let's say, some speeding up of the disposition of family
11 law cases taken as a group, masking the increase in delays
12 in other cases.

13 We don't know that you do. I'm not saying
14 you do. We just don't know one way or the other, and the
15 same could be true if you wanted to get more granular, you
16 know, get into business law cases or something like that.
17 You can't tell from the OCA data whether business law
18 cases as a category have gotten faster to disposition,
19 slower to disposition, or staying about the same. They do
20 also have this data on a county by county basis, and we
21 looked at the -- what we asked for were the ten largest
22 counties. I was a little surprised to find some counties
23 in the list of the top ten, and that's reproduced here as
24 well, and they show different trends for different
25 counties.

1 Harris County is showing a very marked
2 shortening of the time to disposition at 18, taking more
3 than 18 months category went all the way from the 30 --
4 low thirties as a percent of the dispositions to the 9 to
5 13 percent range in the last couple of years. And some
6 less dramatic but significant improvements in some other
7 counties, some worsening situations in still other
8 counties. There are some others that are about the same,
9 and also you'll note as you get into some of these
10 individual counties that there are some quite wide year to
11 year fluctuations that, at least, make you want to stop
12 and ask why did that happen.

13 HONORABLE STEPHEN YELENOSKY: And I would
14 just point out in Travis County that precipitous drop from
15 2004 to 2006, which just happens to coincide with my
16 tenure on the bench, not that that has anything to do with
17 it.

18 Actually, that is a good example. It
19 doesn't have anything to do with me, but one of the things
20 you can't tell from this is obviously why. In the last
21 couple of years, besides the local administrative Judge
22 Dietz has put in place an aggressive dismissal for want of
23 prosecution system that by this summer will have
24 essentially caught up with the backlog and then we'll be
25 on a routine DWOP, D-W-O-P, that is, Dee Dee, that

1 hopefully keeps the backlog down, so that's just one
2 example of how you can't really tell what's going on.

3 MR. SCHENKKAN: And we've listed in Jeff's
4 excellent summary memo the work we did, and I guess it's
5 the third page, second sheet, bottom of the second page
6 top of the third page a number of the different specific
7 questions about changes in the law, substantive or
8 procedural, or changes in management procedures, including
9 the mass torts panel in Harris County, that could easily
10 account for significant portions of these changes in
11 specific counties or statewide and that just illustrate
12 the limitations we have on our knowledge with the OCA
13 data, both in terms of if we have a problem of delay and,
14 if so, in what cases and counties that problem exists.
15 These questions that we are not able to answer from --
16 look like plausible candidates for explanations for some
17 reductions in times to disposition. We just don't know
18 whether they are, in fact, the reasons, and if so, to what
19 extent.

20 There is, of course, no OCA data on the
21 costs of litigation, and that is our second possible
22 problem in the system that a rocket docket might, again,
23 or might not, appropriately be designed to address, and so
24 one of our recommendations we want to at least call to
25 people's attention was it might be a good idea to work

1 with the OCA to change the data collection system if it
2 can be done in a way that's not too burdensome on the
3 courts or the district clerks or the practitioners and see
4 if we can't use the OCA to generate better data, not just
5 for our purpose for this rocket docket study, but for all
6 sorts of tasks of the court system including the ones that
7 the full SCAC has addressed from time to time or may
8 address in the future. And this would be a wonderful time
9 to do that. They are on their 25th anniversary. They are
10 in the process of making some recommendations to the
11 governing body which they report to, which is the --

12 MR. BOYD: Judicial Council.

13 MR. SCHENKKAN: Which is the Judicial
14 Council, which we should be well-represented on, to make
15 changes in that. So it's kind of a good time to make
16 suggestions to them for suggestions in changes in the data
17 collection process, and that may be the single most useful
18 thing we've learned out of this process; but in short, we
19 don't see any signs of a global, you know, statewide civil
20 case worsening delay problem; and down below that level of
21 detail we don't know whether we have a specific category
22 of cases with a delay problem, either statewide or in
23 particular counties, that the rocket docket might or might
24 not help with.

25 MR. BOYD: Let me add to that a little bit.

1 A couple of points. One, on the OCA, and we should say
2 that the staff at the Office of Court Administration was
3 great to work with, continue to be great to work with.
4 When we e-mailed over there, their -- who was it, their
5 executive director. He's not here today. I'm losing all
6 their names from my memory at this moment, but their
7 executive director and two of their senior staff folks,
8 one of whom often attends these meetings --

9 MR. SCHENKKAN: Let's give them credit.
10 Carl Reynolds, the director; Angela Garcia, who is the
11 judicial information officer. This is her job, working
12 with this data. She's just excellent. And Ted Wood,
13 their special counsel for trial. All three of them really
14 pitched in.

15 MR. BOYD: And Ted actually coincidentally
16 was here at our meeting in December, and so he kind of
17 knew and they kind of cleared their calendar for an
18 afternoon, let us come over and pick their brain and have
19 been very helpful following up, but their ability to help
20 us is limited by the data they have, and the reality is
21 the data that they have is not very useful for our purpose
22 except for the kind of big 10,000-foot picture that is
23 shown in Exhibit A, because beyond that you get the county
24 by county and you see it works -- some have worse problems
25 with delay than others, but there is no reason without

1 anecdotal information to know why. The data doesn't tell
2 you.

3 They are in this process of -- they are
4 about to make recommendations to the Judicial Council for
5 new rule-making that would -- could potentially, for
6 example, result in a civil cover sheet requirement like
7 you see in Federal court. When you file a case in state
8 district court, the plaintiff's lawyer has to fill out a
9 sheet so that the burden is on the attorneys and not on
10 the clerks who don't know anything about the case to come
11 up with the data. They're looking at those issues, and
12 the Judicial Council has a committee that is advising them
13 as they prepare to make these recommendations, and Bonnie
14 happens to be on that committee, and so this committee
15 already has some involvement in that process, but Ted and
16 the folks at OCA made it very clear they would love to
17 have whatever input this committee would want to give to
18 them for how to make that -- how to make that better so
19 that ten years from now when we're looking at issues like
20 this there will be better data to work off of for our
21 purposes.

22 But, in terms of this subcommittee's
23 purpose, I mean, frankly, we kind of sat around and said
24 anecdotally "I don't think delay is an issue, and if
25 rocket dockets are supposed to address delay, you know, in

1 Travis County you can get a trial pretty much as quick as
2 you want to. Well, yeah, and Harris County too, and here,
3 too." And as we kind of vetted through all of that,
4 really cost is probably the issue that would be better
5 addressed, but, you know, all my clients would love to
6 figure out a way to pay me a lot less. I mean, so then it
7 becomes a real -- I mean, the reality is you get into a
8 dispute over a 7,500-dollar roofing bill or whatever and
9 you can't afford to litigate the dispute, and so cost
10 becomes a bigger factor, and yet as we looked at the
11 literature -- and we'll talk about that in a little bit --
12 rocket dockets don't -- you know, intuitively you think,
13 well, if we're going to get it resolved quicker it's going
14 to cost less, but the reality is at least some of the
15 literature tells us that's not true.

16 It costs more because you're having to go to
17 more hearings to keep it on track, and basically what
18 you're doing is you're taking all of the time that you
19 would spend out over a longer period of years and you're
20 combining it into one short period of time where you do
21 nothing but that case, and I think in December I told you
22 I had that kind of case where by agreement we rushed
23 everything to a quick resolution, and the bill was a lot
24 larger than -- it was large enough that my client wouldn't
25 tell you that it was a cost-saving measure. We were able

1 to get it resolved more quickly, which we had to do, but
2 it wasn't cheaper.

3 So that's sort of the dilemma we find
4 ourselves in as we try to identify what problems to try to
5 solve, because if we're going to make recommendations on
6 what a rocket docket ought to look like -- because there
7 are different varieties. There are mandatory, voluntary,
8 those that shoot for resolution in six months and those
9 that shoot for resolution in a year. A lot of the
10 varieties we've talked about, but bottom line, we're
11 having a hard time as a subcommittee of pinpointing what
12 problems we're trying to solve here so that we know how to
13 design the solution, but that's sort of where we are in
14 terms of that background.

15 I don't know, Chip, whether it's useful to
16 talk about a reconstituted charge for a little bit or to
17 talk about the data issues for a little bit or whether you
18 would like for me to go on to that next part, which is the
19 summary of the literature and what other rocket docket
20 systems have looked like.

21 CHAIRMAN BABCOCK: Yeah, let's stick with
22 the data for a minute and if anybody has questions --

23 MR. BOYD: Okay.

24 CHAIRMAN BABCOCK: And I'll start off by
25 asking one, or a couple maybe. One thing that was alluded

1 to here but wasn't fleshed out -- and I suspect because
2 there are not statistics -- but is the correlation between
3 delay and case load; and to take two examples, the filings
4 in Harris County, I think, are down over the last few
5 years where the filings --

6 HONORABLE JANE BLAND: They're not. They're
7 not.

8 CHAIRMAN BABCOCK: They're not?

9 HONORABLE JANE BLAND: No.

10 CHAIRMAN BABCOCK: Are they about the same
11 or have they increased? About the same?

12 HONORABLE JANE BLAND: About the same, and
13 they're about the same or slightly higher, not including
14 the MDL cases that have been extracted.

15 CHAIRMAN BABCOCK: Excluding MDL. Okay. In
16 the Eastern District of Texas I think they're up, aren't
17 they? Maybe I shouldn't assume that.

18 HONORABLE JANE BLAND: We just got data
19 about that.

20 MR. BOYD: Yeah, and actually, did we
21 include Eastern or was it Virginia that we put in here?

22 CHAIRMAN BABCOCK: You've got both. I was
23 very surprised to see the disposition time in the Eastern
24 District of Texas as being virtually no different than our
25 state court system on average.

1 HONORABLE JANE BLAND: That's right. For
2 civil cases.

3 CHAIRMAN BABCOCK: For civil cases. Because
4 the perception in the legal community is not that at all.
5 The perception is if you go to the Eastern District of
6 Texas, you will zip through that system in a heartbeat.

7 MR. SCHENKKAN: We did get the data on the
8 quantities, too. Did you find it?

9 HONORABLE JANE BLAND: We did. What we got
10 was average pending case load, which doesn't answer the
11 question of how much is that -- of that is cases that have
12 been taking a while to resolve and how much of it is new
13 filings, and new filings would indicate nothing about
14 whether or not delay is a cause for the backlog or an
15 increase in the number of pending cases, if there's a lot
16 of new filings.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE JANE BLAND: But I think it was
19 something like 350 per court. Total cases.

20 MR. SCHENKKAN: This is what I have. I
21 didn't have the one with the average in there.

22 HONORABLE JANE BLAND: Yeah, it was 3,000
23 case -- 3,100 cases in eight courts, and you do the math.
24 Somebody can divide eight into 3,100. 360, something like
25 that.

1 MR. SCHENKKAN: Just under 400.

2 CHAIRMAN BABCOCK: Just under 400. And
3 that's in the Eastern District of Texas?

4 HONORABLE JANE BLAND: Correct.

5 MR. SCHENKKAN: And it's been steady at
6 somewhere near that level, 400 to 500, or just under 400
7 to 450 for however far back this goes.

8 CHAIRMAN BABCOCK: 387, but who's counting.
9 We have somebody with a calculator. And that's been
10 consistent for how long, Pete?

11 HONORABLE JANE BLAND: We have the first
12 number as 2001.

13 MR. BOYD: There's a lot more --

14 HONORABLE JANE BLAND: They added a court in
15 2002, and that -- they had a little bit of a, you know,
16 drop in pending cases because of that and -- but that is
17 not, you know -- I don't know about case loads from county
18 to county in Texas, but that's quite a few -- that's
19 quite -- that's fewer cases, I think, than the average
20 district judge in an urban county in Texas is handling.

21 CHAIRMAN BABCOCK: Yeah. Yeah. The other
22 question about the data, I noticed that in both Bexar and
23 Travis Counties, which have central docket systems, which
24 is supposedly designed to lead to quicker resolution, that
25 both those counties were much higher than the -- in the

1 pending more than -- both in the 12 to 18-month category
2 and the over 18-month category than some of their -- some
3 of the other counties, particularly in the over 18-month.
4 Any explanation for that?

5 MR. SCHENKKAN: Yes. I don't know about
6 Bexar County, but certainly in Travis County, this is,
7 again, anecdotal. We don't have the court administration
8 data on it, but I would bet a hundred dollars against a
9 hole in a donut that the administrative law cases are a
10 very large component of those that take more than 18
11 months to resolution, and there are good reasons -- well,
12 there are reasons for that, and one can debate what they
13 are, but they are distinctive reasons.

14 CHAIRMAN BABCOCK: Judge Yelenosky, did you
15 have a --

16 HONORABLE STEPHEN YELENOSKY: Well, I have
17 talked to Judge Dietz, and we have statistics, but they
18 don't help really figure out much more than the statistics
19 from OCA, so I would echo just the comment that we don't
20 have very helpful statistics. Two things other than that
21 are, as I said, DWOP is an issue. And you don't know, for
22 instance, you know, whether these are over 18 months and
23 active or over 18 months and inactive.

24 The other thing is that with a central
25 docket it's a demand-driven docket, demand of attorneys,

1 and so the capacity may be there, but the will may not.
2 Either neither attorney may want to move it forward or one
3 may and the other may not, which is why when coming to
4 solutions we need to understand whether there's a capacity
5 problem or not; and if so, where, because I really don't
6 think there's a capacity problem in Travis County. Our
7 court administrators say they can guarantee if you want a
8 jury trial you can get one within six months from the day
9 you ask for it and probably within three to four months,
10 so it's not a capacity issue. It may be a will issue, and
11 if that's -- if it's considered a problem, with our
12 central docket anyway, that some things are taking longer,
13 the solution there may be simply a signal that we are to
14 entertain scheduling orders from one side against the
15 resistance of the other to do things more quickly.

16 MR. BOYD: Chip, on that point, anecdotal
17 again, but I agree with Judge Yelenosky that what the
18 central docket does is it -- it's even more effective in
19 allowing the attorneys to control the pace of the case,
20 which is philosophically in contradiction to what a rocket
21 docket is all about, and if you read the literature, one
22 of the consistencies in all different jurisdictions that
23 have imposed a rocket docket is it only works if the judge
24 grabs a hold of the case and imposes strict case
25 management rules and deadlines and makes the case keep

1 moving and sanctions parties when they stop that from
2 happening. That works -- well, it's ironic that one of
3 the articles -- and I have to dig back to remember, but I
4 show it on the -- in the report here. One of the ways to
5 make it work according to one jurisdiction is you quit the
6 central docket and you go to an individualized management
7 docket per judge so that each judge can stay on top of his
8 or her case. Another one of the articles says in order to
9 make it work you've got to quit the individualized docket
10 and go to the central docket so that you can have other
11 judges who are available to step in and resolve things
12 when they come up, and that kind of gets us back to the
13 problem of what's the problem we're trying to solve.

14 The irony here is rocket dockets were
15 established going way back into the Sixties, but then at
16 the state court level more in the Eighties, not so much to
17 get quicker dispositions but to clean off backlogs of
18 cases. There were too many cases pending and they
19 couldn't get to them, and so they started putting them on
20 rocket dockets to get rid of them, and the irony is that
21 we're now looking at rocket dockets as a way to attract
22 more cases back into the courts. And so, again, you've
23 got to define what you're trying to achieve in order to
24 design a system that's going to achieve it, but I do think
25 the issue in Travis County -- and I can list cases that

1 we've rushed through, and Judge Yelenosky is at least
2 familiar with one or two of mine that have just been
3 sitting there for several months because the clients
4 aren't ready to get back to war against each other --

5 HONORABLE STEPHEN YELENOSKY: I'll set a
6 scheduling order.

7 MR. BOYD: -- for a variety of reasons.

8 MR. SCHENKKAN: On the central docket issue,
9 I want to add some further admittedly anecdotal support
10 for what Jeff just said. I think the assumption was that
11 you needed -- when we started this was that you needed a
12 central docket to make a rocket docket work, and Jeff has
13 given some indication that that's not so. There's people
14 writing on this who say you need the central docket and
15 people who say you need the opposite. The Eastern
16 District of Virginia falls in the category of some of my
17 friends think we need central docket and some of them
18 think we need individually assigned, and I'm in favor of
19 my friends. They have done it both ways during the time
20 they've had the rocket docket. They started out with the
21 central docket and then they had a change in their
22 presiding judge, and he didn't like the central docket,
23 and they now have it assigned, and they still have the
24 rocket docket.

25 The key, either way, is what Jeff says. It

1 is judges who are insistent, regardless of the parties'
2 desires, that the case will be moveed at a certain pace.
3 That's the key. And you can do that in a central docket
4 system or you can do that in an assignment system, but you
5 can only do it in either system if you have judges who are
6 willing and able to do that.

7 HONORABLE STEPHEN YELENOSKY: But that
8 points out also the difference between the attorneys and
9 possibly the clients, because if a rocket docket is
10 designed to help litigants who want to go more quickly,
11 and their attorneys don't want to go more quickly, then
12 who are we -- who are we answering to, essentially,
13 because if their clients want to go more quickly and it's
14 a demand-driven system where the attorneys can do that
15 then either they're not doing what their clients want or
16 there's some other problem.

17 CHAIRMAN BABCOCK: Yeah, Judge Christopher.
18 And Judge Peebles had his hand up a minute ago, and I'd
19 like his thoughts on Bexar County, but Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: Well, of
21 course, this is -- a lot of this is anecdotal, but Harris
22 County used to have a huge backlog when we were in a
23 central docket system, and then we went to an individual
24 docket system, and that really dramatically decreased our
25 case load, and there is a lot of reasons for that. You

1 are more on top of dismissals for want of prosecution,
2 you're more on top of, you know, bankruptcy dismissals,
3 you're more on top of a lot of things in terms of managing
4 your docket because all of the sudden everyone knows how
5 many cases are on your docket, and you pay attention to it
6 to try and get your numbers down. Some people thought
7 some judges kind of went overboard in trying to get their
8 numbers down, and, you know, so that caused some problems.

9 But what we have found now is kind of a
10 combination of the individual docket/central docket, so I
11 can understand why there is this dichotomy in the
12 literature; and what we have been doing sort of
13 internally, if one of us gets involved in a fairly long
14 trial, but we still have other cases that are, you know,
15 set during a two-week time period, we'll e-mail around and
16 say, you know, "Who's got some time this week for a
17 trial?" And people -- you know, people will volunteer,
18 and so then you start assigning out cases that were on
19 your court to someone else, and that just happened to me
20 recently. I had gotten kind of bogged down in a couple of
21 cases and I had like three or four car wrecks that claimed
22 they were ready to go, but if you don't have a judge ready
23 to try them, they just sit there. So I called around.
24 Two judges said, "Yeah, send me your car wreck." Well,
25 three immediately settled, and the fourth one went to

1 trial.

2 So, truthfully, I think a combination of the
3 two systems works well because you've got that individual
4 management of your docket and, you know, you know your
5 case, but, you know, sometimes you do get stuck doing one
6 thing and you've got to have the other judge backing you
7 up, the central docket type system to back you up.

8 CHAIRMAN BABCOCK: Judge Peebles.

9 HONORABLE DAVID PEEPLES: Well, Tracy and
10 Pete and Stephen and Jeff said what I was going to say,
11 which is, you know, individual dockets are amenable to
12 judicial control and central dockets are for the lawyers,
13 and the lawyers a lot of times don't push, and the judges
14 in a central docket don't push them to trial, and I think
15 that explains a lot.

16 At some point, this is a different point, I
17 would like to talk about the mix of these cases, because I
18 think these statistics treat a tax case and a big
19 commercial case both as one case, and that's just totally
20 inaccurate to do that. My guess is that Dallas and
21 Houston have much more complicated commercial litigation
22 than anywhere else in Texas, certainly more than we do in
23 Bexar County, which makes their numbers even more
24 impressive, because those are huge cases and they've got a
25 lot of them. And then, you know, Collin County, which is

1 on here, is not a place that a plaintiff would choose to
2 file a lawsuit, if you've got a choice.

3 CHAIRMAN BABCOCK: To put it mildly.

4 HONORABLE DAVID PEEPLES: Hidalgo County or
5 Jefferson County is not on here, but those are good places
6 to file cases. And so we need to deal with that, too, the
7 attractiveness of the place to file, and Collin County
8 looks like real good here, and there may be a lot of
9 reasons for that, but I'll bet you they don't have a whole
10 bunch of big PI cases there.

11 CHAIRMAN BABCOCK: Great point.

12 MR. BOYD: Chip, can I just address one of
13 Judge Peeples' points, which is the type of case, the
14 complicated tax case and all that? And we're aware of
15 that. All these different factors are what make it
16 difficult to figure out how to address the solution, how
17 to design a solution. Exhibit C shows the best data we
18 could find that tries to break it down by type of case,
19 and that's those columns that are difficult to read. The
20 first is "injury or damage involving motor vehicle" and
21 "injury or damage other than motor vehicle," then
22 "worker's comp," then "tax cases, condemnation, accounts."
23 I can't even read the next one.

24 MR. SCHENKCAN: "Reciprocals."

25 MR. BOYD: "Reciprocals, divorce, all other

1 family matters," and then the big one, "all other civil
2 cases." That's useful data on a statewide basis looking
3 at this information, but you can't then turn and connect
4 that data to a category by category disposition rate. You
5 can't -- you can't look and see does it take longer to
6 resolve one of these types of cases than another, nor can
7 you say does it take longer to resolve one of these types
8 of cases in any particular county.

9 MR. SCHENKKAN: Because they don't collect
10 the data that way.

11 MR. BOYD: Simply because they don't collect
12 it that way.

13 MR. PERDUE: How do they get this data?

14 MR. BOYD: The clerks.

15 MR. SCHENKKAN: The clerk fills out a form,
16 and the form and reporting instructions are 30, 40 pages
17 long from the Office of Court Administration.

18 CHAIRMAN BABCOCK: Frank had his hand up
19 next, but before we get to Frank, Judge Peeples, the Bexar
20 County number that's got in the over 18 months, 30
21 percent, as opposed to a much lower percentage in other
22 major metropolitan counties, is that just because it's a
23 lawyer demand-driven docket or --

24 HONORABLE DAVID PEEPLES: I don't know.

25 CHAIRMAN BABCOCK: Are you surprised by that

1 number?

2 HONORABLE DAVID PEEPLES: Yes, I am.

3 CHAIRMAN BABCOCK: Yeah, I was, too.

4 HONORABLE DAVID PEEPLES: Well, somebody
5 made the point, another way of looking at this is can
6 people who want to get to trial get to trial with a trial
7 setting that will be reached, and in Bexar County and I
8 think in Travis you have a 99 percent chance of being
9 reached. I mean, you get a trial date and you know you're
10 going to trial with a certainty of about 99 percent. That
11 means a lot to lawyers. It doesn't show up in these
12 stats, and I don't know what the numbers are elsewhere,
13 but I have no explanation for the bad numbers in Bexar
14 County.

15 HONORABLE SARAH DUNCAN: Well, isn't it true
16 that Bexar County had -- I remember looking at -- when
17 Bexar County was asking for more judges, I remember seeing
18 statistics on the number of cases disposed of by a judge
19 in Bexar County. Bexar County doesn't have the number of
20 judges per case. I mean, if you look at a population of
21 cases, Bexar County has significantly fewer judges to
22 handle that population of cases than does Dallas and
23 Houston. At least it did at one point. I don't know if
24 the two additional judges rectified that or not, but it's
25 a consideration obviously.

1 CHAIRMAN BABCOCK: Yeah. Frank.

2 MR. GILSTRAP: I think we're doing something
3 here that the committee has probably told us we shouldn't
4 be doing, and that is we're looking at this data and we're
5 generalizing about, well, gosh, two of these counties have
6 higher numbers, they have central docket systems,
7 therefore, central docket system doesn't move cases.
8 Tarrant County has similar numbers except in '06 to Bexar
9 and Travis, and they don't have a central docket system.
10 Yes, they do have a lawyer-driven system, not a
11 judge-driven system, but the point is none of these
12 statistics should be used to support any argument, because
13 as the committee told us -- and I want to compliment them
14 for going in and making this effort and reaching an
15 important conclusion, which is that the data from the OCA
16 is utterly useless for our purposes.

17 If you'll look at Exhibit C over here and,
18 you know, just my quick math, I come up with 730,000 total
19 cases. 70 percent of those are family law and tax law
20 cases. If you take all of the personal injury cases, it's
21 less than ten percent. So if the data in a county is
22 going down, it may be -- or is going up, it may be the
23 economy is forcing a whole lot more tax cases into the
24 court. We don't know. Hidalgo County, the numbers are
25 down. Look at those numbers. It's there, and there's

1 been a dramatic decrease in cases over 18 -- over 18
2 months.

3 Candidly, this whole thing kind of strikes
4 me as a solution in search of a problem, and that doesn't
5 mean there's not a problem. Certainly there are problems.
6 We're just not sure what they are. We've got a solution
7 that has solved problems in some areas, but I don't see
8 any -- any basis in these numbers for connecting this
9 solution to some problem in Texas. That doesn't mean we
10 shouldn't do it, but I think we need to stay away from
11 these statistics in trying to support our arguments.

12 CHAIRMAN BABCOCK: Yeah. The other thing,
13 the flip side of that, Frank, is that these statistics
14 could support any argument.

15 MR. GILSTRAP: Yeah. Okay. I forgot I was
16 with lawyers.

17 CHAIRMAN BABCOCK: Buddy.

18 MR. LOW: That's a good point. When you
19 were talking about numbers in Eastern District, they go by
20 weighted numbers. A patent case is a three or a four.
21 The clerk gives those numbers by weighted numbers, so it's
22 not like -- it hits what David's talking about it. It
23 analyzes it more than just this is a case.

24 MR. BOYD: They actually do both, and I
25 didn't bring that with me, but I had my legal assistant

1 have the -- I think it was Eastern District of Virginia
2 faxed us one of their reports yesterday, and it shows raw
3 numbers and then weighted numbers where certain types of
4 cases are a 1.46 instead of a 1 because they take more
5 resources to resolve.

6 MR. LOW: But, see, the Eastern District
7 does it to see how the load is between judges. I mean,
8 that's the reason the weighted number.

9 CHAIRMAN BABCOCK: Judge Yelenosky.

10 HONORABLE STEPHEN YELENOSKY: I'm on this
11 subcommittee, and one of our discussions I think when we
12 realized that the data wasn't going to help us much, one
13 of the things I suggested ironically is that we go to what
14 is effectively anecdotal information, and I think there
15 was some appeal of this or this was appealing to some. If
16 you want to find out if there's a problem, you survey
17 lawyers in these different counties and ask them, "Do you
18 have a problem getting to trial and what type of cases?"
19 And maybe we could ask around here anecdotally if that's
20 the case, because the question is not in the statistics,
21 but "Do you have a hard time getting your case disposed of
22 within what you consider to be a reasonable time?"

23 And if uniformly across the state the vast
24 majority of the lawyers say "no" right now, but yet we're
25 hearing somewhere in the background that people think

1 things are taking too long, then again, that may mean a
2 difference of opinion between lawyers and their clients or
3 it may mean, as often is the case, that the reputation
4 lags way behind the reality, because the literature we're
5 reading, at one time that certainly was true.

6 I read the California stuff. For a while
7 there it was taking five years to get to trial, and that
8 stopped sometime in the Nineties, but it may take five or
9 ten years for people to realize it.

10 CHAIRMAN BABCOCK: Okay. Kent and then
11 Carlos.

12 HONORABLE KENT SULLIVAN: I think when you
13 talk about a rocket docket inherently you focus on speed,
14 but I really wonder if that's what we ought to be focusing
15 on. To me the question is efficacy, and it really is one
16 in which speed is a substantial component of that because
17 something that has long delay, of course, is problematic
18 to say the least, but leaving out the question of quality
19 of disposition misses the point entirely, it seems to me.
20 You can create fast dockets that dispose of cases in
21 fashions that are completely unsatisfactory to everyone if
22 speed is your only component of a potential solution.

23 If I could make one observation that my
24 experience, such as it is, has led me to, is that in this
25 state we have a problem that -- I don't know how unique it

1 is, but when our courts of plenary jurisdiction have
2 threshold jurisdiction beginning at a few hundred dollars,
3 we have a problem. We have a problem because you are
4 asking judges in courts to be both small claims courts and
5 courts with unlimited and complex jurisdiction. Those
6 pose two very different sets of problems for people trying
7 to manage dockets. In fact, I think those are totally
8 different dockets. In one case you have small cases that
9 may be nearly generic cases. Those are like Judge
10 Christopher's car wrecks that she mentioned a while ago in
11 every urban county -- well, indeed every county I think
12 has cases like that, and those really are probably very
13 capable of a central docket type of disposition where
14 speed is probably a more significant component of
15 efficacy. There are probably few great jurisprudential
16 decisions to be made in a car wreck case.

17 At the same time, when you get a case that
18 is complex and it may involve, you know, tens or hundreds
19 of millions of dollars and all of the moving parts that go
20 with that, I think it is probably more likely to work well
21 with an individualized docket where someone can create a
22 coherent case management plan and the litigants know that
23 the plan, such as it is, such as it has been designed,
24 will be enforced by the person who either designed it or
25 mandated it on a coherent basis and on a consistent basis,

1 presumably. And the lawyers and the litigants have an
2 opportunity to educate the judge in the best sense of that
3 term by their constant appearances, as you normally get an
4 increased number of appearances with a complex docket.

5 Anyway, the point I'm trying to make and I'm
6 being too longwinded about it is just to say I think the
7 historical circumstances that brought us our courts of
8 plenary jurisdiction where we ask them to be small claims
9 courts at the same time are a real problem. They affect
10 the sort of solution that we need, and we need to
11 acknowledge it.

12 CHAIRMAN BABCOCK: Carlos, then Pete, then
13 Buddy.

14 MR. LOPEZ: The reason I think that no
15 matter how well-intentioned our effort is, is it may end
16 up being futile, is that it depends on a lot of things;
17 but its successful implementation, I think one of the most
18 common denominators we saw, if not the most common
19 denominator, was the willingness of the judge -- and
20 willingness and ability, I guess, of the judge to have
21 real settings that everybody -- like Kent just said --
22 real settings that everyone knows is a real setting and
23 that, in fact, will be a real setting; and there are
24 things that undermine the judge's ability to do that, even
25 where there's a willingness to do it, for example.

1 And I think this is where the number of
2 cases, the sheer mass volume of cases on the docket or
3 cases that are set for trial on the docket, may be a
4 problem. I went to a seminar, I don't know, five years
5 ago when I was still a judge, and Lamar McCorkle was
6 talking about something, you know, down there. He kind of
7 said -- he said something that was interesting. He said
8 in Dallas at the time what everybody wanted to do is they
9 said you want to get it done fast, set it all for trial.
10 Just, you know, case gets filed, answer gets filed,
11 scheduling order, set for trial. You've just gone a very
12 long way towards congesting your trial docket because
13 every case, no matter if it's two years away from being
14 ready for trial, is now set on that trial docket getting
15 in the way of every other case that is set on that trial
16 docket, which is, of course, every other case on that
17 docket because the minute you file an answer you get set
18 for trial.

19 And so he mentioned that some places had
20 kind of thought of this idea of what about letting the
21 case percolate, not let it be on your docket, but not have
22 it set for trial until it's ready to be tried, and then
23 only the ones that really are ready to be tried are, in
24 fact, on the trial docket getting in the way of all the
25 other cases. What happens is it helps do what Judge

1 Christopher said, which is -- and in my experience it was
2 the same way. You've got four cases set for trial and the
3 reason you still have four cases set for trial is because
4 you've got three other cases keeping that one case from
5 settling. The minute those people realize they really are
6 going to get reached they settle, but until they get to
7 that point they don't. So just the mere fact that there
8 is other cases there just makes the problem worse, and so
9 that's just one comment that -- so it kind of goes to what
10 was said over here, which is just because we can't design
11 the perfect solution doesn't necessarily mean that we
12 can't at least pick the low hanging fruit, you know, which
13 is you've got to have the judges that are willing to do it
14 and capable of doing it and a system that's set up to make
15 that be able to happen, to be able to happen.

16 And my other comment was just from reading
17 those -- you know, the Virginia articles and just my own
18 experience, I guess, was that it's really -- the other
19 common denominator is pretty simple. If you want a rocket
20 docket you need a rocket judge. Any docket that has a
21 rocket judge is going to become a rocket docket, and
22 there's different ways to get there, none of which will
23 work unless you have a rocket judge who is ready, willing,
24 and able to tell people, "You know what, I don't care, you
25 know, what the lawyers think about the case. I don't care

1 what the clients think about the case. I say it's ready
2 for trial, so call your first witness," and that's
3 easier -- I'm just going to go ahead and say it. That's
4 easier for a Federal judge with a lifetime appointment to
5 do than for a state judge who is responsive to a public
6 electorate.

7 Maybe that's good thing. I'm not saying
8 it's a bad thing. You know, we kind of joke about it.
9 Maybe that's what's -- you know, maybe that's good about
10 our state system. I mean, I'm not passing that judgment,
11 but those are factors that are there that I think overlay
12 all of the statistical detail, you know.

13 CHAIRMAN BABCOCK: Pete, and then Buddy.

14 MR. SCHENKKAN: I want to follow-up on a few
15 things that both Kent and Carlos have said. I have a
16 college friend who I have recently gotten back in touch
17 with who has practiced in the Eastern District of Virginia
18 for 30 years, and he made exactly the point you're making
19 about the speed versus the broader definition of efficacy.
20 He says the way the Eastern District of Virginia gets
21 things done so fast is it doesn't matter how meritorious
22 your discovery motion is, it's denied.

23 MR. MUNZINGER: That's exactly right.

24 MR. SCHENKKAN: Because that's how you can
25 stay on the schedule, and thus, there is an enormous price

1 paid in terms of what at least all of us who sometimes do
2 these kinds of cases might have thought was really an
3 important motion and really unfair to have it be denied;
4 and your comfort, if there is any, is if the other side
5 had a similarly meritorious motion, it would also be
6 denied. But, of course, that's not much comfort if you're
7 the one with the meritorious motion and it's been denied,
8 and then that gets me to Carlos' point, which is at least
9 in the Eastern District of Virginia with lifetime tenure
10 of Federal district judges you do have pretty good
11 confidence of regardless of who the client is on either
12 side and regardless of who the lawyer is, even the
13 meritorious discovery motion will be denied.

14 Question, do have you that same degree of
15 confidence with elected judges all over the state? And if
16 you don't have that degree of confidence, if the
17 perception -- and I will not talk about the reality. Just
18 the perception is I can't count on that then have -- by
19 instituting a rocket docket somewhere in the state of
20 Texas system have you actually made the underlying problem
21 of people fleeing the judicial system for alternatives
22 worse because they know they're going to get to trial
23 really quickly and really unfairly, with the people with
24 the local political advantage having the upper hand, that
25 only one side's discovery motions will be granted, and it

1 won't be theirs. So, I mean, that's where I am on the
2 rocket docket so far.

3 Now, that's not to say we couldn't talk
4 about designing a rocket docket that was by agreement
5 where both sides wanted a rocket docket, or maybe it would
6 be possible, especially if there are other reforms in the
7 court system so that there are different Texas courts for
8 different sizes and types of cases, maybe even possibly a
9 system that can be triggered by one side in certain
10 circumstances, but as a general across the board
11 proposition, you're in the teeth of this basic problem of
12 the way you get this done is by the judges, politically
13 protected from any criticism, saying, "I don't care
14 whether you need more information or not and whether it
15 would make a difference to the outcome or not, we're not
16 going to do it so that we can get to trial on my original
17 scheduled date."

18 CHAIRMAN BABCOCK: Buddy, then Richard, then
19 Sarah, then Nina.

20 MR. LOW: Chip, I think one thing we need to
21 look at is to analyze the demands on the court. What are
22 the demands? Back in the early years land cases, you
23 know, mostly involving land, then finally other things,
24 the car wreck, the comp, those things are gone. Then came
25 products liability, medical mal, and each of those have

1 different aspects, and so you need to analyze the demand.
2 Then we came along with the mass tort cases, and where are
3 we going next? You know, I don't know, but we need to see
4 what the real demands on the courts are, how many of these
5 cases are what, and then we can deal with them, I think,
6 better once we know what the demand of the court is.

7 CHAIRMAN BABCOCK: Well, and Jeff made a
8 good point, that the genesis of this project was to create
9 more demand.

10 MR. LOW: Right.

11 CHAIRMAN BABCOCK: And not to solve what
12 rocket dockets were traditionally designed to solve, which
13 was to eliminate backlog.

14 MR. LOW: But I'm talking about categories.

15 CHAIRMAN BABCOCK: It's a totally different
16 thing.

17 MR. LOW: Categories of the cases. We see
18 what the demand, that's what people are demanding and they
19 will demand more of that --

20 CHAIRMAN BABCOCK: Yeah.

21 MR. LOW: -- if it's inviting to them.

22 CHAIRMAN BABCOCK: Gotcha. Richard, and
23 then Sarah.

24 MR. MUNZINGER: I just wanted to look at the
25 system, and I asked myself the -- I'm a quaint person.

1 What's the system for? Oh, my, to find out what the truth
2 is and to find out what justice would be between two
3 parties who have differing views of the same transaction.
4 The rocket dockets ignore all that. In Federal court my
5 personal belief is it's because the judges see themselves
6 compared to people nationwide and are concerned that if
7 their docket numbers are -- show delay that they're viewed
8 as less than their fellows who show a faster docket.

9 The rocket docket is a joke. I was in the
10 Eastern District of Virginia. I shared this with you last
11 time. I go down, and I have seven or eight cases, four
12 square in point. I get shuttled to a magistrate, who was
13 a very pleasant woman, who told me that my seven cases
14 made no sense, to her. They were four square in point. I
15 said, "Ma'am, the other side didn't cite a single case on
16 that."

17 "I understand, Mr. Munzinger. Your
18 objections are overruled. It's very hard to find cases on
19 point on this subject matter." I said, "Yes, ma'am. I
20 found seven."

21 "Your objection is overruled, Mr. Munzinger.
22 I'm not going to sanction you because you had cases in
23 support of your position." Now, I was like five months
24 away from trial according to their docket. I appealed to
25 the United States district judge; and my adversary, who

1 was a Washington, D.C., lawyer, laughed at me. He laughed
2 at me. Because I sought to take advantage of rules and
3 law for my client. Well, we settled the case, and that
4 was the message I tried to deliver last time.

5 Everybody, you lose sight of what the
6 purpose of these rules are for. The purpose of the rules,
7 you have real living human beings, people who have put
8 their lives and souls into creating their businesses.
9 It's not all General Motors, and even if it is General
10 Motors, as Buddy once said, General Motors is just a bunch
11 of people, human beings, who have done what they want to
12 do. So you come to court and you think, gee, I'm going to
13 get justice in the greatest republic democracy, whatever
14 you want to call it, in the history of the world and I'm
15 going to get justice and you're told "Go fly a kite, son.
16 The law means nothing."

17 "I want a summary judgment, your Honor."

18 "You're not going to get a summary judgment
19 in this court, Bud," or he may not say that to you. What
20 he says is, "I'll carry your motion through the trial and
21 consider it a motion for directed verdict or
22 notwithstanding the verdict when the case is over," and at
23 that point in time you're sitting there looking at a
24 multimillion-dollar verdict that you can't bond your
25 appeal on, and you've got people in your client's business

1 who have lost their jobs because they made bad judgments
2 because they believed in the law? They read the law?

3 The law doesn't make any difference in
4 rocket docket. What makes a difference -- I have lived
5 through this in the Western District of Texas. What makes
6 a difference is that the judge wants his case -- now, I'm
7 not talking about a living judge. I'm talking about and
8 we've spoke about --

9 CHAIRMAN BABCOCK: One who recently died?

10 MR. MUNZINGER: He had to clear his docket.
11 He had to move on, but Judge Bunton gave you three days to
12 try a case, and he didn't care what the case was. I've
13 shared this with you-all. I said, "Gee, I had this
14 securities fraud case and I say to the judge, 'Judge, my
15 expert is going to take the better part of a morning and
16 the afternoon to testify.'" He laughed at me. He said,
17 "You get ten minutes to summarize your expert's testimony,
18 Richard." You didn't put expert witnesses on the stand in
19 Judge Bunton's court. You stood up and you said, "If
20 called as a witness Professor X would testify to the
21 following," and you sat down. Your adversary stood up and
22 did the same thing, and the Fifth Circuit let him get away
23 with it, and that's justice? That's not justice.

24 In all -- I'm sorry to be emotional about
25 it, but I've been victimized by it and I've seen clients

1 victimized by it. Don't lose sight of what this is all
2 about. The truth of the matter is truth counts, justice
3 counts, and if you start adopting rules -- and I don't
4 mean to to be ugly, but some politician says, "Well, we
5 need to have a rocket docket," he doesn't know what he's
6 talking about. He thinks he is going to get elected to
7 something for it. Be careful, because you're dealing with
8 truth, you're dealing with justice, and those things do
9 count. They should.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: I believe in
12 justice, too.

13 CHAIRMAN BABCOCK: A second for justice.

14 HONORABLE SARAH DUNCAN: And I'm thrilled
15 with this discussion. It's the discussion I wanted to
16 have at our last meeting because I just wasn't convinced
17 that the statistics were going to support a rocket docket,
18 but listening to everybody talk has caused me to realize
19 what I want a rocket docket for. My background is in
20 commercial law. You're talking about, Richard, securities
21 fraud. I don't know what Pete's case was, but I think --
22 and you know, I listened to what Judge Sullivan talks
23 about, efficacy and the quality of the decision matters.

24 I wonder -- this is so politically
25 incorrect. I remember that letter, I think that was in

1 our materials the last -- at the last meeting that we're
2 going to create two tiers of judges, and I understand that
3 that's a very unpopular idea, but I think we need two
4 tiers of judges. I think we need a tier of judges who can
5 handle that half billion-dollar commercial construction
6 case or the half billion securities fraud case, because
7 those types of cases take extreme expertise in that area
8 of the law, and I wouldn't expect every single trial court
9 judge in this state -- I have no expertise in securities
10 fraud, and if I were a district judge you shouldn't give
11 me that case because I don't have that expertise, and to
12 learn about that area of the law is going to take enormous
13 amounts of my time and, if I had an assistant, my
14 assistant's time. So I'm wondering if the type of rocket
15 docket we should be talking about is specialized dockets
16 for extremely complex types of cases.

17 CHAIRMAN BABCOCK: Jeff, you might -- Nina,
18 we'll get to you in two seconds, but you might note that
19 what Sarah describes exists in Philadelphia. Their Court
20 of Common Pleas has different divisions. They have a
21 class action --

22 HONORABLE SARAH DUNCAN: Class actions are a
23 good example.

24 CHAIRMAN BABCOCK: -- division. They have a
25 complex commercial division, and I know in the class

1 action area they had a judge, he's now retired, who was
2 recognized as one of the nation's leading authorities in
3 class actions.

4 HONORABLE SARAH DUNCAN: Can I make one
5 other small point?

6 CHAIRMAN BABCOCK: Yeah. Yeah.

7 HONORABLE SARAH DUNCAN: I think you would
8 also be doing the courts of appeals and the Supreme Court
9 enormous relieving them of a great deal of their docket
10 burden because the cleaner decisions you get from the
11 trial court, the less there is to do on appeal.

12 CHAIRMAN BABCOCK: Nina.

13 MS. CORTELL: It seems --

14 CHAIRMAN BABCOCK: Do you believe in justice
15 first?

16 MS. CORTELL: I do. I do.

17 CHAIRMAN BABCOCK: Everybody is going to
18 have to swear to that before they make a comment.

19 MS. CORTELL: Let the record reflect. My
20 goodness. It seems to me whether or not we go rocket
21 docket route with this committee, we all are interested in
22 increased efficiencies, and what has been very exciting to
23 me in listening to the discussion today is that we've
24 certainly identified certain things that would facilitate
25 greater efficiency in the court, I think without sacrifice

1 for quality. Just by way of example, one of the
2 historically difficult problems in Dallas are the multiple
3 trial settings. You get ready, you don't get reached, and
4 then you get reset six months later.

5 And toward that end, Judge Christopher's
6 thought about some combination of the central docket with
7 the assigned docket, if we could somehow fashion the best
8 practices -- and I don't know if that's possible within
9 our format -- but that would legitimize that concept that
10 a Dallas district judge could then find a substitute judge
11 to take that case and provide coverage of that Dallas
12 district judge to do so, that would be a great thing.

13 Now, I will give a footnote that we have a
14 new Dallas judiciary, so I can't say what's going to be
15 happening there right now. We don't really know, but
16 historically this has been a problem, so if we could
17 provide some framework for best practices or for a
18 combination of some of the things we've heard, that
19 certainly seems to me that that would be a good thing
20 whether or not we as a group say we should go forward with
21 rocket docket.

22 CHAIRMAN BABCOCK: Carlos had his hand up
23 and then Judge Yelenosky and then Judge Christopher.

24 MR. LOPEZ: I don't think that we should
25 back away or be ashamed of basing the decisions on

1 anecdotal evidence, because at the end of the day I think
2 it might be the best information we're going to have, and
3 I'm not quite sure, it may end up being the only
4 information that really is helpful because the statistics
5 are such that you don't know what to do with them because
6 there is always some other variable that you can't tie
7 down. An economist can tell you real easy, well,
8 everything else being equal, you know, an individual
9 docket works better than a central docket. Well, they're
10 never equal, and even if they were, they change from this
11 county to this county, so you're shooting at multiple
12 moving targets, so I don't see how you get there from the
13 information.

14 I think it's helpful to visit. I think it's
15 more helpful to have it than to not have it, but I think
16 that we have to -- it's going to take a healthy dose of
17 anecdotal evidence from the right sources, and I can't
18 think of a better group than this one for that. I just
19 think we -- you know, it is what it is. When three new
20 county court judges in Dallas came on the scene back in
21 like '97 they came up with this idea of a melded docket.
22 I don't remember exactly what they called it. I wasn't
23 one of them. It was publicly announced in the Dallas Bar
24 Headnotes and some other places and at the CLEs that the
25 judges put on that in these three courts if you're set for

1 trial in this court, you're set for trial in any of these
2 three courts and so if any of those three judges is
3 available, you're going to trial, period; and what we
4 found -- what they found, I was watching from the
5 sidelines because I'm a cautious person -- was that the
6 mere threat of having -- of just people knowing that that
7 was possible kept the cases settling and kept them moving
8 and made it less likely that you would even need to
9 actually do it, which is what I was talking about with
10 Judge Christopher, which is she sends an e-mail. We did
11 that too in district court, you know, but it's sort of ad
12 hoc. You know, you just kind of send an e-mail and, you
13 know, everybody knew who were the four judges that were
14 willing to do it on a Friday even though it wasn't their
15 case and everybody knew who the eight judges were that
16 weren't going to do it. You know, every county is going
17 to have their nuances like that way unless we legislate
18 something that makes it official. Anyway, so that's my
19 two cents on that.

20 The issue that Justice Duncan brought up
21 about sort of the -- I call it a qualifications of the
22 judges issue, you know, in district court you have the
23 only qualification for being elected is you have to have
24 been a lawyer for five years, period, doesn't matter what
25 kind of lawyer, doesn't matter what kind of law you did,

1 doesn't matter how good a lawyer you were. If the public
2 decides they want to put you there, they can put you there
3 with all of the good or bad that that entails. So, I
4 mean, I just think we need to be cognizant of how much
5 we're biting off to chew if we import that subpart sort of
6 into the rocket thing. I think it's a good idea to
7 analyze it, but as a member of the subcommittee, just be
8 real clear about -- we already had some issues about what
9 is exactly our charge here, so let's just be real clear
10 about how much we're biting off to chew and then let's be
11 real clear for the subcommittee so we know what to do,
12 because there is so many moving parts to this beast it
13 just ends up it's unbelievable.

14 CHAIRMAN BABCOCK: Judge Yelenosky, will you
15 yield for a quick counterpoint?

16 HONORABLE STEPHEN YELENOSKY: Sure.

17 HONORABLE SARAH DUNCAN: And I was
18 suggesting something more like the MDL judges, that we
19 have a process where we certify this as a complex
20 commercial half billion-dollar potentially case and get it
21 to somebody with expertise in commercial law of whatever
22 sort it is. Sorry.

23 CHAIRMAN BABCOCK: Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: Two things.
25 One, on the combination issue Judge Christopher talked

1 about and Nina talked about, that can go from either end.
2 You could have a default that is an assigned docket or a
3 default that's a central docket and still have a
4 combination. In Travis County we have a local rule that
5 takes you out of the central docket with approval of the
6 local administrative judge, and moreover, all
7 administrative appeals of agency decisions are
8 automatically assigned to a particular judge. So there is
9 that fail safe, and every one of the district judges has
10 his or her docket of assigned cases.

11 Now, one may say it should be more than it
12 is or less than it is, but you can go in either direction.
13 With a default on a central docket, though, combined with
14 assigned cases, as Judge Peeples said, 99 percent sure
15 you're going to go. I think we missed five jury trials
16 total last year, and that was all in one crazy week, so
17 you do have that certainty there. I just want to say you
18 could go either way on that.

19 With respect to specialized judges and all,
20 I think there is a fundamental problem with those
21 proposals as long as you have a constitutional system that
22 has elected judges, and there are arguments -- and I'm
23 sympathetic with the arguments for appointment of judges,
24 but we don't have appointed judges, and when you start
25 talking about assigning things to particular judges then

1 you have to ask, well, did they have to be judges from the
2 jurisdiction in which --

3 HONORABLE SARAH DUNCAN: We do it in MDL.

4 HONORABLE STEPHEN YELENOSKY: The venue in
5 which it was elected or not. Anyway, I'm just saying
6 there's a fundamental issue there that I don't think can
7 ignore -- can be ignored when talking about whether cases
8 should go to a particular judge or another.

9 CHAIRMAN BABCOCK: Judge Christopher.

10 HONORABLE TRACY CHRISTOPHER: I don't want
11 to talk on that issue. What I wanted to talk about is
12 something that I think that might be useful, and again,
13 it's anecdotal information, but at the Harris County
14 Bench/Bar conference we were talking about how to make
15 cases more efficient or cheaper, and a continuing theme in
16 a lot of -- we were in little breakout groups, lawyers and
17 judges sitting around talking, and a consistent theme in
18 those breakout groups was more early hands-on management
19 by the judge. Similar to the Federal pretrial conference,
20 come in, you know, lay out what your case is about, do
21 your -- you know, what time you need, how many
22 interrogatories, et cetera, kind of what we anticipated
23 with the level three cases; but judges are not doing that,
24 okay, and lawyers are not asking judges to do that early
25 on; and I was saying, well, you know, it would be a total

1 waste of my time and lawyers' time if I sent out a notice
2 like that in every single one of my cases, total waste,
3 because there are so many cases that couldn't possibly
4 need a pretrial conference and it would just be, you know,
5 a waste of everybody's time if they came down for it.

6 So the question is, how would you identify
7 the cases on your docket that would benefit from such, you
8 know, sort of early hands-on management; and I said to the
9 lawyers, "Well, you-all can just schedule a pretrial
10 conference in front of me if you want one." Well, that's
11 not in -- that's not in most state court lawyers'
12 vocabulary, that, whoa, you know, I'm going to come down
13 and schedule a pretrial conference with the judge, but
14 it's in our rules, it's certainly allowed; and perhaps,
15 you know, we could strengthen that area of the rule in
16 terms of -- it would be sort of a simple fix that might
17 lead to more efficiency, efficacy, that you come into the
18 judge and say, you know, maybe "This case is a small case,
19 I want to limit discovery, I want to limit the costs.
20 Will you help me do it, Judge?" Or, you know, "This is a
21 complicated case, but I still, you know -- we want to sit
22 down and get it ironed out really early on."

23 For a lot of cases, you know, the level one
24 is working fine. It's the level twos and the level threes
25 where you kind of get into this level two case that

1 suddenly expands like crazy or a level three case that
2 takes forever and forever and forever because nobody is
3 pushing it to sort of keeping it moving. So, you know, I
4 think that that might be a -- something that we could get
5 our hands around and propose to -- you know, like I said,
6 I'm pretty sure it's in the rule, but nobody really does
7 it in terms of coming in and asking the court for the
8 assistance.

9 MR. AGOSTO: I just wanted to add, Chip, as
10 a follow-up to what Tracy is saying, I have customarily
11 filed what's called a status conference, motion for status
12 conference, and I use it kind of to do exactly what she's
13 saying, which is we're stuck. You know, most judges in
14 Harris County will force a docket control order on us or
15 ask us to agree to one, but where there is a problem
16 either with the trial or the discovery or whatever -- and
17 I don't call it a pretrial conference per se, but I do it
18 early enough in the game so that if we have to go from
19 level two to three or there are issues, we have a just
20 motion for status conference. I notice it, the court
21 gives me a date, and we go down there and we have a
22 discussion with the judge, and that gets the case going,
23 whether we're not going to meet the six to nine-month
24 trial date or we are or there are issues. And that, you
25 know, of course, it's a lawyer who is pushing it, but

1 maybe some hybrid where the judge has the option to set a
2 status conference to discuss issues may be a way to get us
3 moving.

4 CHAIRMAN BABCOCK: Gene.

5 HONORABLE TRACY CHRISTOPHER: It's just
6 really hard for a judge to be able to -- even if I read
7 every case that got filed in my court, it's very hard with
8 our pleading requirements to know whether this is a big
9 case. I mean, you can look at something, you can think
10 this is a big case and, you know, a month later, motion
11 for arbitration, case goes away. You know, I don't have
12 to worry about it anymore.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE TRACY CHRISTOPHER: Or, you know,
15 grievously injured, well, you know, is that a sore back or
16 is that a brain injury? So you can't really tell just
17 from reading your petition whether the case would benefit
18 from that kind of management.

19 CHAIRMAN BABCOCK: Yeah. Benny. I mean,
20 I'm sorry, Gene.

21 MR. STORIE: Yeah, I just wonder, Jeff or
22 other members of the subcommittee, does the literature
23 have anything about surveys of clients, participants in
24 the system, or like exit poll data because it seems if
25 we're thinking of this as a kind of customer service

1 problem in the judicial system being able to do a better
2 job or being more attractive, then we should do what any
3 business would do, which is we ask the customers what they
4 want, what they're happy with or unhappy with; and I
5 suspect, of course, that they're going to be all unhappy
6 with delay; and I suspect that's going to be a problem of
7 getting your lawyer's time and attention more than a
8 capacity of the system; but I would expect also that's a
9 good place to start with a question.

10 HONORABLE SARAH DUNCAN: Uh-huh.

11 MR. BOYD: I don't remember seeing any that
12 talked about any kind of objective statistical summary of
13 survey of people's views on the systems. There are
14 articles written by judges who were instrumental in
15 implementing the system and them talking about how it
16 worked. There are lawyers who write their experiences
17 with it, and so, as you might imagine, there is a mix of
18 opinions. There are Frank Gilstraps -- or Richard
19 Munzingers, I'm thinking of, who believe that it's all
20 about speed over justice and it's a terrible system.
21 There are others who are praising how effective it was in
22 diminishing the backlog in particular.

23 HONORABLE STEPHEN YELENOSKY: Are any of
24 those clients, though?

25 MR. BOYD: But they're not -- they're not

1 from the clients. They're from the lawyers and judges.

2 CHAIRMAN BABCOCK: Carlos.

3 MR. LOPEZ: Part of the issue, I won't say
4 part of the problem, is that we kind of engage in the
5 ultimate legal fiction, which is it's argued that our
6 system of elected judges is the ultimate customer survey
7 and the ultimate power of decision and that if a judge
8 isn't doing it right they won't be a judge for very long,
9 or if a judge isn't doing it the way the people who he or
10 she supposedly is responsive to, that they will find
11 somebody else, and on paper that's true. I think
12 everybody sitting around this table knows that as a
13 practical matter that's bologna.

14 So, you know, again, how much -- how big a
15 problem do we want to bite off, you know, when we do this
16 because I do think there are limits to how well you can
17 implement even the best structured program in the
18 realities of our, you know -- like Stephen said, of our
19 system, which so far mandates, you know, elected judges
20 and here's the issues and constitution says that.

21 I mean, the MDL issue, some people argue --
22 I'm not sure I agree with them, but some people argue
23 that's the first step down that road, which is I file my
24 case because I like the judges in this county, and it's --
25 you know, I'm one step farther removed from being able to

1 know who my judge is going to be and much less someone who
2 I can go to the ballot and vote against if I don't like
3 them. So it's a big -- philosophically it's a much
4 bigger -- they're all -- all those issues are
5 interconnected, and we're biting off a pretty big chunk,
6 so --

7 CHAIRMAN BABCOCK: Harvey.

8 HONORABLE HARVEY BROWN: I was going to
9 comment on Judge Christopher's suggestion, if we have this
10 change in form for filing a petition that the Office of
11 Court Administration dictates, it seems to me that a good
12 thing to put on there would be request for status
13 conference or pretrial. It will at least make the lawyers
14 have to look at the box and think about it ahead of time,
15 and that would be a good thing, because, as she said, as a
16 judge you don't know whether they need it or not, but the
17 best way to find out is if the parties tell you.

18 The second thing is, it does seem to me that
19 we're guessing a lot, so I would strongly urge us to talk
20 with the Office of Court Administration to see if we can
21 get better data in the future. You know, we have in this
22 room talked about problems sometimes for five, six, seven,
23 eight years and in that five or six years we could be
24 gathering new data where we break down cases by, you know,
25 business dispute, tax dispute, et cetera, so that maybe

1 five years from now we can do a better job of analyzing
2 this, but I do think that's important to start with.

3 CHAIRMAN BABCOCK: Pete, then Bonnie.

4 MR. SCHENKKAN: Yeah, I really want to
5 follow up on what Harvey just said. I think it is
6 certainly true that there are going to be grave
7 limitations in any data collection system on this large
8 scale, especially any system that we can tolerate the cost
9 and burdens of, but there is some low hanging fruit here.
10 A system that puts all the different kinds of cases we are
11 interested in in the category "other civil cases" is not a
12 helpful system. We need to break that down into the
13 categories of interest to us and get subcategories, and it
14 shouldn't have to be done by the clerks. It shouldn't be
15 added to their burden. It ought to be done by the lawyers
16 with a choice of categories that OCA gives them, and then
17 we ought to look at that opportunity when we have a draft
18 of that form, a draft of the form that the lawyer filing
19 the case or filing the answer, require it of the
20 defendants as well, has to, you know, look at certain
21 boxes and pick "yes" or "no" or fill in some number.
22 Let's look at what those boxes ought to be, and maybe they
23 ought to include, you know, things like request for status
24 conferences.

25 CHAIRMAN BABCOCK: Bonnie, then Carl. Then

1 we'll take a break.

2 MS. WOLBRUECK: Just a little bit about the
3 OCA new report that is being worked on. The committees
4 have been working for probably over a year in trying to
5 change this report, and we've had subcommittees working in
6 all of the different divisions of the courts, and the
7 committee that I work on is one of the committees that
8 will be submitting the report to the Texas Judicial
9 Council, and we have met this past week. We're meeting
10 again next week, so the completion of this work is coming
11 near to where the goal of the OCA is to have the report
12 completely finished and ready for the clerks to start
13 using in September of 2008, but just to give you an idea
14 of, yes, there are many more breakdowns already on the
15 proposed report.

16 There will be a separate family law report
17 that pulls all the family law completely out of the civil
18 data. The civil report will be a separate report that I
19 think right now there are probably ten or twelve
20 breakdowns and are still -- the committee is still
21 requesting additional information on any additional
22 breakdowns that may be necessary for data collection, so
23 this is an important time for you to get that information
24 to OCA, to me.

25 The Texas Judicial Council will be getting

1 it in the next month or so for their approval, so that
2 there is an awful lot of effort that has to be done after
3 it's actually approved in order for the courts and the
4 clerks to implement it. So that's the reason the time
5 frame is rather lengthy here until its actual
6 implementation, but anyway, I'm going next Tuesday to the
7 meeting, would be happy to take any information that you
8 would have or recommendations. Judge Sterling Wood from
9 Harris County is chair of that committee. Judge McCorkle
10 from Harris County also serves on our committee, so any of
11 us would be more than happy to take that data in. It will
12 be looked at, again, probably by the judges at their
13 judicial conference in September possibly. There is an
14 opportunity there for judges' input again before the
15 formal and final report is adopted, but we are getting
16 close to looking at some final data, so this is very
17 timely. So if you have any recommendations, please let us
18 know.

19 HONORABLE STEPHEN YELENOSKY: Can I just
20 make a quick point on the data issue? The one big picture
21 I think we understand is that the number of family law
22 filings is strictly a function of population growth; and
23 so we do have to pull that out; and what I've also heard
24 is while divorce filings are going down, family law
25 filings aren't, because, of course, fewer people may be

1 getting married, but they're still having kids, so you
2 still have suits affecting the parent-child relationship;
3 but one fundamental thing is the connection between
4 population growth and number of family law cases, which is
5 not true for the civil cases, which, of course, are much
6 more affected by, for example, tort reform.

7 CHAIRMAN BABCOCK: Carl and then Ralph, and
8 then we'll take a break.

9 MR. HAMILTON: Can we be reminded what the
10 legislative mandate is in connection with this?

11 CHAIRMAN BABCOCK: I don't think there is
12 any particular mandate other than Senator Wentworth and
13 Justice Hecht were talking about --

14 MR. HAMILTON: Okay.

15 CHAIRMAN BABCOCK: -- ways to do things like
16 this, but I kind of put it into that subcommittee just
17 because there was no rule particularly that it applied to.
18 Ralph.

19 MR. DUGGINS: Does this data include
20 ancillary proceedings or contested proceedings in the
21 probate courts?

22 MS. WOLBRUECK: The new report will actually
23 be a separate probate report. They're breaking that out
24 also as a separate report, and I'm not sure of all of the
25 information that's on that report. The new reporting will

1 have -- Andy, would you know if the current report breaks
2 any of that out in probate?

3 MR. HARWELL: No, I don't know, but I will
4 find out.

5 MR. SCHENKKAN: I think we do know that
6 whatever data there may be on the probate, it's in a
7 different report than the one we've been working from
8 today. The one we've been working from today is just the
9 district courts civil. There is also district court
10 criminal and there's, I think, two more, and maybe the
11 probate is in its own category.

12 CHAIRMAN BABCOCK: Let's take our morning
13 break.

14 (Recess from 10:32 a.m. to 10:53 a.m.)

15 CHAIRMAN BABCOCK: I thought that was a
16 terrific discussion, and I had an idea, but like most of
17 my ideas it's probably a bad one, but I'll throw it out
18 anyway. Since we're going to necessarily have to rely on
19 some anecdotal information and since I think that there is
20 a little bit of a disconnect, hopefully not too much, but
21 some disconnect between lawyers and judges on the one hand
22 and our clients on the other and since this project is
23 designed to make our system more palatable or attractive
24 to clients on both sides of the docket, I wonder if it
25 might not be interesting at our next session to invite

1 some clients to our meeting and just hear what they have
2 to say.

3 They really don't have much of a voice in
4 our system other than filtered through us, and we all have
5 a stake -- we all have a stake in how the system works
6 from our own interests, although we're always trying to
7 vindicate the clients' and public interest, and I'm
8 thinking about, you know, somebody like -- I know Justice
9 Hecht has been in touch with Jack Balagia, who is the head
10 of litigation for Exxon Mobil. That would be somebody on
11 the mostly getting sued side and maybe we could, you know,
12 find some people that represent groups that -- of people
13 that are traditionally plaintiffs, and anyway, if you get
14 a panel of people to come talk to us, something different
15 than we've ever done before, but that doesn't mean we
16 shouldn't do it. Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: I was just
18 going to say at the local bench/bar last week we had -- I
19 don't know if he was the general counsel, but perhaps, of
20 Dell speaking about arbitration versus court.

21 CHAIRMAN BABCOCK: Uh-huh. Yeah.

22 HONORABLE STEPHEN YELENOSKY: Just something
23 to note.

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE JANE BLAND: Well, we have client

1 panels fairly regularly at lots of CLEs in Houston and
2 around the state, and I'm just not sure bringing a client
3 panel to a rules meeting -- I mean, we would certainly get
4 the perspective of those people we invited to come talk,
5 but --

6 MR. BOYD: Yeah, my thought on --

7 CHAIRMAN BABCOCK: Doesn't excite you?
8 Jeff.

9 MR. BOYD: I could bring you a panel of
10 people who have nothing but complaints about how the
11 system works for them or I could bring you a panel of
12 people who love how the system works for them, either on a
13 one-time case the one and only time they were involved or
14 people who are involved all the time, and so which panel
15 do you want? I mean --

16 CHAIRMAN BABCOCK: Well, what if we could
17 get a mixture maybe?

18 MR. BOYD: Well, you know, we might could,
19 but I'm not sure that would reflect -- you know, I mean,
20 we talked about that as a subcommittee. If the data don't
21 give us the full picture -- the data don't, that doesn't
22 sound right, but I guess that's right. Pete's been
23 training me to use "data" as a plural noun, so I'll try
24 real hard.

25 CHAIRMAN BABCOCK: Somehow "the data don't"

1 doesn't sound right.

2 MR. BOYD: The data do not tell us what we
3 need to know, we talked as a subcommittee should we in
4 essence do a survey of some type, if not a written then --
5 or a series of interviews of people in a variety of
6 significant communities around the state, judges, lawyers,
7 litigants to the extent you can figure out who to talk to,
8 and get a better anecdotal picture of what's working and
9 what's not working, because our view is from the data that
10 there's not a problem here to be solved if we think rocket
11 dockets are supposed to solve a problem of delay.

12 CHAIRMAN BABCOCK: Right.

13 MR. BOYD: So maybe -- and that may be a
14 better way to do it, is to charge our subcommittee, with
15 apologies to my fellow members, with the job of going out
16 and gathering that kind of information and bringing it
17 back to us.

18 I mean, bringing a panel, I'm not sure a
19 panel could be large enough to be effective to really kind
20 of give a statewide picture, which is not to say -- I
21 mean, I know that as a subcommittee -- and by the way, I
22 should say I think you've heard Carlos, Justice Patterson,
23 Justice Pemberton, Judge Yelenosky, Pete, and Judge Bland
24 are on the subcommittee, and they've done a great job and
25 given up lunches more often than they would like to --

1 HONORABLE STEPHEN YELENOSKY: No, I was
2 eating during those phone calls.

3 MR. SCHENKKAN: Some of us need to give up
4 lunch -- me.

5 MR. BOYD: And, by the way, we interviewed
6 -- I interviewed Kent Sullivan, and Professor Hoffman was
7 very helpful to us on the data, so a lot of people have
8 helped get us where we are now, but we definitely need
9 some direction, because I think the sense of the
10 subcommittee is we don't know how to design a solution
11 when we don't know for sure what problem we're trying to
12 fix. I think the issue of justice that Richard has shared
13 with us is a legitimate concern, and any solution you
14 develop needs to address -- needs to be careful about
15 that. On the other hand, cost and delay deny justice just
16 as often probably as an overzealous commitment to speed.
17 So there may be a problem to address. We just need a
18 better sense of what it is.

19 CHAIRMAN BABCOCK: Munzinger and I talked at
20 the break. We've decided it's just him. The judge just
21 didn't like him in that case.

22 MR. BOYD: Well, I think, you know, Kent
23 was -- I guess he's gone. Kent expressed the exact same
24 concerns when I visited with him, and I think that he
25 toned down his articulation of his concerns this morning

1 from what he and I talked about, but it's the same sense,
2 which was, look, if you design your system to get speed,
3 you're going to get speed, but you may not get justice,
4 and that is a real concern we have to consider.

5 CHAIRMAN BABCOCK: Yeah. Justice Patterson
6 and then Justice Bland. Somebody over here, Ralph, and
7 then somebody over there had their hand -- Harvey. Okay.
8 Justice Patterson.

9 HONORABLE JAN PATTERSON: I agree with Jane
10 that I think that we could probably not get the type of
11 sampling that would be useful to this committee, so you
12 could either target it with a group of people who
13 habitually select arbitration and get their take on why
14 they select arbitration over litigation and what would
15 bring them back to the system. That's a possibility, but
16 otherwise, I also think that the committee could conduct a
17 more meaningful survey of a wider variety of -- it would
18 still be anecdotal, but it would be wider than this
19 committee could do as a whole and might be helpful because
20 we could talk to a wide variety of groups of people, and I
21 don't think that it would be the same rant as that that
22 might occur if it were a selected group targeted for this
23 whole body.

24 CHAIRMAN BABCOCK: Yeah. That's a good
25 point, that, Jeff, talk to the people who are opting out

1 of the system to see what their thinking is. Okay.

2 Justice Bland.

3 HONORABLE JANE BLAND: Well, if what we're
4 trying to decide is whether or not to offer a rocket
5 docket then maybe what we should ask potential users of
6 rocket dockets -- and that would be plaintiffs' lawyers
7 who would be filing the cases if it was something that
8 could not be agreed -- if that would be something
9 attractive to them, or if it was going to have to be
10 agreement of the parties, plaintiffs' lawyers, clients,
11 defense lawyers, to see if this product is even attractive
12 to them. Because I think if we ask their opinion about
13 what's wrong with our current system we're going to get
14 all the same sorts of answers and lots of differing
15 opinions about cost, delay, and the reasons behind it, but
16 if we ask them, you know, sort of instead of "What's wrong
17 with the current system," ask them instead "Is this a
18 product that you would be interested in as a user if it
19 were developed?"

20 Maybe we would get a sense of that, because
21 I could see people saying, "Well, there's a lot of things
22 wrong with the system, but I don't want to -- I'm more
23 afraid of a rocket docket, so I don't want to try that,"
24 or I could see just the opposite. "I'm happy with the
25 system, but, you know, for some kinds of cases my clients

1 might be interested in using a rocket docket."

2 CHAIRMAN BABCOCK: Yeah. Ralph and then
3 Harvey, then Frank. In fairness, Frank, because you got
4 your hand up late.

5 MR. DUGGINS: If you're going to do -- come
6 back and ask for some reports from constituent groups, I
7 would like to suggest you consider checking in, say, the
8 top ten counties, what's the situation there by types of
9 case. I mean, Frank and I, for example, could report on
10 Tarrant County where in my own view I think there is a
11 problem in family law where people are held hostage, and
12 we talk about plaintiff and defendant. Divorce cases
13 shouldn't be lasting two and three years, but they do, so
14 I'd like to suggest that we try to take the top counties
15 and just check and come back with some better anecdotal
16 data.

17 Second, I think that we have to take into
18 account this bill that could make family law judges
19 district judges and vice versa. I don't know whether
20 that's likely to pass, but it's certainly a topic of a lot
21 of conversation in Fort Worth, so I just wanted to mention
22 that.

23 CHAIRMAN BABCOCK: Okay, Ralph, thanks.
24 Harvey.

25 HONORABLE HARVEY BROWN: I was going to say

1 something very similar to Justice Bland, which is I think
2 the question for the client isn't whether they like the
3 system now. Everybody in this room would have ways to
4 improve the system now. The question really is "Would
5 this other system be, in your view, a better system," and
6 I think that we need to be careful, too, because some of
7 the client's view is based on one or two experiences. I
8 mean, if you ask the client who's been in certain counties
9 who was set for a rocket docket, they might be totally and
10 completely against it, but if they were in another county
11 with a certain judge, they might be very, very happy with
12 it.

13 So I think that Carlos was talking about the
14 complexities here, and I think just getting some clients
15 to talk about generalities might not be as helpful. I
16 mean, I've seen that with clients who would talk about
17 delays and they don't want delays, but then you're two
18 months from trial, you get a hundred thousand documents
19 from the other side, and they want you to move for a
20 continuance for six months, but they would generally say,
21 "I'm against delay."

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE HARVEY BROWN: So I think it's
24 something that we would have to be very careful how we use
25 what the clients told us.

1 CHAIRMAN BABCOCK: Yeah. Good point.
2 Frank.

3 MR. GILSTRAP: As I understand, this whole
4 exercise is being driven by the perception that people
5 aren't using the court system as much, that there is some
6 alternative way to do it, and that we've got to make our,
7 quote, "product," close quote, more, quote,
8 "user-friendly," close quote. Is that anecdotal or did
9 your investigation of the statistics find anything to
10 support that? In other words, are filings up, are filings
11 down? You know, where is that idea coming from, that
12 filings are down?

13 CHAIRMAN BABCOCK: Justice Bland.

14 HONORABLE JANE BLAND: As I understand it,
15 and I wish Justice Hecht -- did he leave, because he knows
16 way more about this, but it's not that filings are down so
17 much, although, I think, you know, I think -- it's not
18 that filings are down so much. They're not growing at the
19 same pace that they used to be, but it's that jury trials
20 are down. So the numbers of filings are still high, but
21 the numbers of jury trials have --

22 MR. GILSTRAP: Is there data on that?

23 CHAIRMAN BABCOCK: Way down.

24 HONORABLE STEPHEN YELENOSKY: We were told
25 last time to ignore the vanishing jury trial.

1 HONORABLE JANE BLAND: I know.

2 MR. GILSTRAP: Is there data on that?

3 MR. BOYD: There is. The OCA has data, but
4 Justice Hecht published an article in the *South Texas Law*
5 *Review* late '05, and it followed on the heels of an
6 article by a guy named Galanter who had done it on the
7 Federal court system, and it was basically Justice Hecht's
8 contribution looking specifically at the Texas system, and
9 it's entitled "Vanishing Jury Trials," something. I can
10 give you the cite, and in his article he recognizes that
11 there are gaps in the OCA data that just make it hard to
12 know for sure, but generally speaking -- and I forget
13 which subcommittee reported on that particular article --

14 HONORABLE JANE BLAND: It was Bob.

15 HONORABLE STEPHEN YELENOSKY: Bob.

16 MR. BOYD: Bob, but the bottom line is
17 filings continue to increase some, and if there are fewer
18 jury trials, why is that, and then he goes on to opine as
19 to various reasons; but the other bottom line for our
20 committee's purposes is that's what we talked about in
21 December, is there really a vanishing jury trial
22 phenomenon, is it an unstoppable decline or is it just an
23 ebb and flow, and ultimately decided we weren't going to
24 overcomplicate our task because to the extent that what
25 we're looking at even addresses that issue, it would still

1 address it because either cost or delay or arbitrary
2 results in the system, and the rocket docket might solve
3 two of those issues.

4 CHAIRMAN BABCOCK: Yeah, and, Pete, if I
5 could just add, Jeff, I think what is driving this effort
6 is a combination of a lot of things, and there are sort of
7 catch phrases for them all. "Vanishing jury trial" is
8 certainly one, and I saw a speech at the American College
9 about a month or six weeks ago from a guy who claims that
10 it's even worse than what Justice Hecht said in his
11 article in the *South Texas*, but who knows. I mean, he was
12 flipping back and forth with charts that it's very hard to
13 follow at some point.

14 MR. BOYD: Are they lies or damn lies?

15 CHAIRMAN BABCOCK: Yeah, right, exactly, but
16 the perception and we may -- maybe at the end of the road
17 here we're going to debunk it and tell the Court that this
18 is not anything to worry about, but the perception is that
19 our -- you know, what our courts are in business to do is
20 vanishing. It's not just jury trials, but it's the kind
21 of cases that have traditionally been filed, and there's
22 no question that some of our traditional docket in my
23 career has vanished. I mean, I grew up trying comp cases,
24 and you don't see them anymore, and that's a legislative
25 mandate that we can't do anything about, shouldn't do

1 anything about.

2 Medical malpractice has unquestionably been
3 affected by what the Legislature has done in that area, so
4 in that -- to that extent it's vanishing, but I think what
5 Justice Hecht and the Court and Senator Wentworth are
6 worried about or thinking about, want us to think about,
7 is whether or not over a period of time, 10 years, 15
8 years, whatever it is, that there are consumers of the
9 justice system that are opting out of the system and not
10 using it. Either they're not filing suits because it's
11 too expensive or they're going to alternative methods of
12 dispute resolution like arbitration or informal ADRs or
13 whatever, and if so, is there a way that we can capture
14 that business so to speak, without sacrificing the things
15 that are important to all of us that Richard articulated
16 so well.

17 And so that's in my understanding -- Justice
18 Hecht had to go pinch hit for Justice Green, who I think
19 is ill or otherwise occupied today, but he'll be back and
20 he can probably articulate it better than I can, but
21 that's my understanding of what the impetus for this whole
22 thing was, and we labeled -- we put another label on it.
23 We've got vanishing jury trial, we have shrinking dockets,
24 and now we've got rocket docket. Those are all too
25 simplistic to describe what is going on here, but that's

1 my understanding of the overall picture.

2 MR. BOYD: But more specifically for us, as
3 Justice Hecht described to me and I think you described to
4 me, is in that broader context there are a variety of
5 groups looking at a variety of issues --

6 CHAIRMAN BABCOCK: Right.

7 MR. BOYD: -- that are intended to address
8 those questions or problems, but you are not aware of --
9 Justice Hecht was not aware of anybody who was looking at
10 the question of delays and rocket dockets within the
11 context of this diminished use of the judicial system, and
12 that's why we were asked to do that.

13 CHAIRMAN BABCOCK: That's exactly right,
14 although, I'll broaden that a little bit to say that a lot
15 of the things that have been brought up today, like
16 Sarah's idea of, you know, of a Philadelphia Court of
17 Common Pleas type expertise judges, that would be within
18 our ambit, I would think, if we thought that was a good
19 idea, even though that's not technically a rocket docket.
20 Justice Bland.

21 HONORABLE JANE BLAND: Chip, what is it that
22 you want our subcommittee to do? Because I don't mind --
23 we don't mind and I'm just saying it because --

24 MR. BOYD: She likes lunch.

25 CHAIRMAN BABCOCK: No, no, no. I think --

1 HONORABLE JANE BLAND: I'd like to eat lunch
2 on Thursday if I can, and I'm happy not to, but I --

3 HONORABLE STEPHEN YELENOSKY: If there's a
4 good reason.

5 HONORABLE JANE BLAND: -- need a direction
6 or our committee needs a direction. We found a lot of
7 information about, you know, what's available out there,
8 about how long it takes to get to trial in Texas versus
9 how long it takes to get to trial under some of these
10 other schemes, but, you know, okay, so we provided that,
11 and we are trying to figure out what exactly we're
12 supposed to be doing.

13 CHAIRMAN BABCOCK: Yeah, well, there are two
14 -- three answers. One, I don't know; two, we want you to
15 spend countless hours producing a massive, impressive
16 product that the Court will ignore; and three, three, keep
17 on doing what you're doing. I think when you get to page
18 seven of this interim report, this is -- you know, this is
19 exactly the type of -- and I talked to Nathan about this
20 this morning. This is exactly the type of thing that I
21 think the Court's interested in and would be useful; and,
22 frankly, my whole thinking on this subject has been
23 changed somewhat by our discussion today. I don't know if
24 Justice Hecht's thinking has been changed or not, which is
25 the important one to consult, but I think what you're

1 doing is terrific, and I think there is a next stage, and
2 we ought to -- sorry, and we ought to --

3 HONORABLE JANE BLAND: And the next stage --

4 CHAIRMAN BABCOCK: Is what is discussed at
5 page seven, but we can -- and we ought to talk about --

6 HONORABLE JANE BLAND: But don't we need to
7 decide first whether we think a rocket docket is something
8 we want?

9 MR. BOYD: Yeah, the issue is -- our third
10 task is on page seven.

11 CHAIRMAN BABCOCK: Right.

12 MR. BOYD: That's the ultimate task, is to
13 then sit down as a subcommittee and say, all right,
14 regardless of whether there's a need for it, regardless of
15 whether it will affect vanishing jury trials, regardless
16 of any of that, if we were going to recommend a rocket
17 docket what would it look like, and et cetera. The
18 problem with that we have in the committee is -- well,
19 it's what I said earlier. You have to design the solution
20 to address a problem. How you design a rocket docket is
21 going to depend on what problem you're wanting it to
22 solve, and we've had a hard time figuring out what problem
23 we're trying to solve.

24 HONORABLE JANE BLAND: Yes.

25 CHAIRMAN BABCOCK: Yeah. And I keep saying

1 that -- and we can ask Justice Hecht when he gets back for
2 more direction on this, but the impetus for this and I
3 think what continues to be the driving focus and force, is
4 not necessarily to reduce backlog, although that's always
5 a useful thing, but rather to create a system that is more
6 attractive to customers, to users, to potential litigants
7 in the system, and is there a way to do that? It may be
8 that you get to page six and you say, okay, "Here are the
9 pros," and you flip over to page seven and you say, "Here
10 are the cons, and here is one that's a push, a pro or a
11 con," and you may say, "We're done, we've had as much
12 lunch at the desk on Thursdays as we can stand because the
13 cons so overwhelmingly override the pros that our
14 recommendation to the Court is forget about this, this is
15 a bad idea, we ought not to pursue it."

16 What we might get in return, as we do
17 sometimes, is "Thank you very much. Now, go finish, you
18 know, page seven because the Court still wants to see what
19 you come up with as a system"; and as I was looking at
20 page seven I saw all sorts of possibilities that could be
21 devised and that may not be very helpful, but that's the
22 best I can say; and we can maybe get Justice Hecht to
23 elaborate on that without having the benefit of your
24 question.

25 MR. BOYD: I think the question -- and so it

1 will be in the transcript, which was helpful to me,
2 because as you know I had to leave early in December and
3 I'm about to leave early again today, but I'll read the
4 transcript and see what Justice Hecht says this afternoon
5 or I'll follow up with you and him.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. BOYD: But do we -- do you -- do you and
8 he want us to further explore whether there is a problem
9 that rocket dockets can address and if so, what is it?
10 For example, panels or surveys or whatever, or do you want
11 us to move straight to, okay, based on what you do know,
12 give us your best shot at Task No. 3, which is what would
13 you recommend? Or do we say, great, that was very
14 insightful, thanks a lot, and we'll let you know your next
15 assignment when it comes up?

16 CHAIRMAN BABCOCK: I think Justice --
17 speaking for myself only, I think Justice Patterson's
18 thought was a really good one, which is to try to
19 investigate or survey the groups that are opting out of
20 our system, and primarily the known group is the people
21 that are going to arbitration and writing in these
22 elaborate arbitration -- as Judge Christopher said, you
23 know, you get a complex case that's filed in your court
24 and you say, "Ooh, this is a level three, and it's going
25 to require a lot of time and management," and the next

1 thing you know you get a motion to arbitrate, which gets
2 granted, and that case leaves our system. Well, why are
3 people doing that? Judge Patterson.

4 HONORABLE JAN PATTERSON: Well, now you're
5 going to get me in trouble with my committee, but --
6 Pete's nodding his head.

7 CHAIRMAN BABCOCK: You know, for someone so
8 thin she's awfully hungry.

9 HONORABLE JAN PATTERSON: Well, but let me
10 also suggest, I think our concern, the committee's
11 concern, is that we respond to a real need and that we're
12 not imposing some arbitrary rule coercively on lawyers and
13 litigants, but I wonder whether we could do that in a
14 slightly different fashion, and that is I really like the
15 idea of pretrial conferences that Tracy mentioned and
16 Carlos is mentioning about the importance of the Judge,
17 and I wonder if we could better spend our time coming up
18 with best practices and try to learn these types of things
19 that can speed up the docket if judges will use them, and
20 then it becomes a matter of judicial education.

21 But there's just not -- we also have to
22 respond to the whole culture of different districts, and
23 we're not formulating something for -- but I do agree also
24 with the comment earlier that whatever system we do as
25 part of those best practices, if we do come up with a

1 system, that it be voluntary and that we try that, because
2 I think we have enough heavy-handed rules.

3 CHAIRMAN BABCOCK: Bunch of hands up, and I
4 don't know who's first, so I'll just go around the table.
5 Andy.

6 MR. HARWELL: I just have some information.
7 Ralph, you and Bonnie asked earlier about the OCA
8 breakdown on the probate. The report is called "Monthly
9 Report Probate and Mental Health," total of probate cases
10 filed, which includes deceased estates and guardianships.
11 Then it has total of probate hearings held, and that
12 includes dismissed and granted cases, and then it further
13 breaks it down into mental health cases, which includes
14 total of mental health cases filed and total of mental
15 hearings held, and I'm not aware of any further breakdowns
16 that are in the discussion at this time. I know they're
17 working on the OCA reports, and so I just wanted to give
18 you that information in case you wanted to look into it
19 further.

20 HONORABLE JAN PATTERSON: Chip, can I have
21 one other thing?

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE JAN PATTERSON: Because I don't
24 think family law cases are down. They may be down in
25 Travis County. I know they're up in Bell County.

1 HONORABLE STEPHEN YELENOSKY: I don't think
2 they're down. Divorces are down, but that's because
3 marriages are down.

4 HONORABLE JAN PATTERSON: But the appeals
5 are up 20 percent, which leads me to another point. If,
6 for example, we have the same filings but fewer jury
7 trials, it may be that what we also kind of need to look
8 at is, I mean, if you have a pretrial conference and a
9 case settles, that's one thing; but if you have a case
10 that falls out of the system because of fear of the jury
11 and fear of lengthy appeals, that's another thing. So
12 it's not as though you can avoid looking at the whole
13 system.

14 CHAIRMAN BABCOCK: Okay. Sarah.

15 HONORABLE SARAH DUNCAN: I don't have any
16 problem with looking at the best practices area. I mean,
17 that might be great. I don't know that it really helps us
18 with the problem of people leaving the system and --
19 because part of leaving the system is never filing the
20 case to get to those best practices; or filing the case
21 and very quickly being sent to arbitration where those
22 best practices aren't going to make any difference. I
23 would really like to know why people are leaving the
24 system. I don't think it's just arbitration, but I think
25 that's a big part of it. I think a big part of it is

1 unexpected jury verdicts that don't get corrected on
2 appeal or take six or seven years to get corrected on
3 appeal.

4 Tracy, Judge Christopher, was saying, car
5 wrecks, you know, you really can't afford to go try a car
6 wreck case anymore. I would like identified the types of
7 cases that are leaving the system, because as Jeff says,
8 there is no point in anybody at this table spending a lot
9 of time designing a solution if that person doesn't know
10 what the problem is, and I think it's who's leaving the
11 system that will generate a solution to that problem.

12 CHAIRMAN BABCOCK: Yeah. That's a great
13 point, in my opinion. Ralph.

14 HONORABLE SARAH DUNCAN: Thank you. And I
15 believe in justice, by the way.

16 CHAIRMAN BABCOCK: Ralph, did you have your
17 hand up?

18 MR. DUGGINS: No.

19 CHAIRMAN BABCOCK: No? Who -- Skip did.
20 Sorry.

21 MR. WATSON: Yeah, I sympathize with the
22 committee because what I hear everyone saying is that
23 their charge was very specific. It's look at this
24 particular solution. I mean, if you look at the first
25 page instead of the seventh page, it's whether and how to

1 implement a rocket docket, not this other stuff, and I
2 think that all they're asking is simply to say, "We've
3 answered that question." I mean, that answer is clear
4 from this discussion. It was clear after ten minutes.
5 The answer is, no, don't implement a rocket docket, and
6 that may sneak back in once the charge is redefined, but
7 we are spinning our wheels until the charge is redefined.

8 We need to look at it in terms of the
9 question has been asked and answered. Now, what are we
10 going to do? We have identified a problem, people fleeing
11 the system. We've had people go right to the number of it
12 and say, first, we've got to identify why they are fleeing
13 the system before we start defining solutions. That's
14 what we need to do, and I just would respectfully suggest
15 that if I were on this subcommittee, I would -- which I do
16 not want to be --

17 MR. BOYD: We have another --

18 CHAIRMAN BABCOCK: There is an opening,
19 isn't there, Jeff?

20 HONORABLE SARAH DUNCAN: And he doesn't eat
21 lunch, so it's good.

22 MR. WATSON: I really would like a clear
23 course of direction and some extent on how far I'm to go.
24 Chip, I think we were both together on the Northern
25 District Cost and Delay Reduction Plan Committee of --

1 CHAIRMAN BABCOCK: Right.

2 MR. WATSON: -- the Civil Justice Reform Act
3 back in '90; and my strong feeling is, is that the rocket
4 docket part of this -- I mean, somebody hit the nail on
5 the head, I think it was Steve, that it is the lag between
6 reality and perception; and it's just -- you know, we went
7 through this 17 years ago on that committee and got into
8 it very deeply; and part of the Biden Bill's charge to
9 these committees was not only get the numbers, but go out
10 and interview the clients. I mean, remember that, going
11 out and interviewing clients. Not just interviewing Judge
12 McBride, but interviewing the clients on what the problem
13 was, and there were memorable moments from both of those
14 aspects, and in doing that we got this kind of data
15 together, the anecdotal of why they're fleeing Federal
16 court.

17 I mean, someone said, "Federal litigation
18 has become the province of the wealthy." You know, I will
19 never forget that phrase as long as I live because it just
20 nailed it, a part of what the problem was; but we also got
21 it down to specific judges, you know, what the problems
22 there and, you know, not granting dispositive motions,
23 carrying them, all of the things that have been discussed
24 today; but we couldn't have done that without a proper
25 charge. We couldn't have gotten to those answers without

1 the goal of what we were supposed to do being very clearly
2 annunciated rather than pointing at a specific solution of
3 saying, "Don't you think we ought to go to the Eastern
4 District of Virginia's type of program?" It's not going
5 to work until page one is redefined.

6 CHAIRMAN BABCOCK: Yeah. Judge Peeples.

7 HONORABLE DAVID PEEPLES: Three brief
8 points. I think we ought to commend Jeff and this
9 committee for not only a good paper report but for a great
10 discussion that they led, and it's just been excellent.

11 Point two, one way to handle this issue of
12 where should they go would be to let them decide. Let
13 Jeff, Justice Hecht, and maybe the committee decide.
14 They've got a better handle on it than we do, especially
15 after this good discussion, but that would be one way to
16 do it, instead of us trying to come up with a committee
17 decision.

18 Point three, I keep thinking about the
19 common law history. You've got the law courts and people
20 who weren't getting what they wanted there and directly
21 went to the chancellor, and the equity courts grew up
22 because the law courts were not meeting their needs, and
23 we run the risk of doing the same thing in Texas and in
24 America if we don't step back and look at our system, not
25 just rocket docket, but what is it about our system that

1 can be better, and we can't do it as a committee so well,
2 but I think you and Justice Hecht and the Supreme Court
3 can decide what can be done by rule, and that's not
4 everything, but what can we do by rule that would make
5 this a better system that people wouldn't want to leave,
6 whether they're going to arbitration, rocket docket, or
7 whatever.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE DAVID PEEPLES: At some point that
10 ought to be done.

11 CHAIRMAN BABCOCK: Yeah, great point.

12 Justice Pemberton. I'm sorry, Pete, I missed you. Go
13 ahead, Pete.

14 MR. SCHENKKAN: I don't want to decide what
15 we ought to do. I want to get some guidance on what we
16 ought to do. If what we ought to do is to be determined
17 by some information, which seems to me, a sensible
18 starting point, I want it understood that the kind of
19 information that is needed, the members of the
20 subcommittee don't have and are not qualified to get and
21 don't have the staffs to get.

22 If what you want to know is -- I want to
23 endorse Ralph's suggestion. If what you want to know is
24 in Tarrant County we have one specific identifiable large
25 scale problem that involves delay, it's family law, don't

1 ask me to do that. I don't have any -- that was the first
2 I'd heard of that. I have no idea about that and no idea
3 how to go about looking into it, but if it's a true, it's
4 a real problem it sounds like, and it would be a big one,
5 and it would be a great service to the people of at least
6 Tarrant County if someone looked at it and figured out if
7 that was a real problem and a solution that might not have
8 any resemblance to a rocket docket.

9 So on the big picture level I want to
10 endorse Ralph's suggestion that a system be devised for
11 getting small group of people, like what you're talking
12 about, Skip, apparently that you and Chip were on together
13 years ago for the Northern District of Texas Federal
14 court, and look into the problem in that area. Is there a
15 problem here, in which kind of cases or is it by judges or
16 is it in the management system at the clerk's office or is
17 it some combination of those; and let those folks report
18 back if there is a problem and what it is; and we may
19 discover that there are three problems, there are 17
20 problems, there are 173 problems; and it might be that for
21 three of those problems or 30 of those problems or none of
22 those problems a rocket docket would be an appropriate
23 solution or partly an appropriate solution.

24 Then at the bigger picture level statewide
25 what we're talking about is this notion of people fleeing

1 the judicial system for the resolution of their disputes.
2 I want to suggest there's actually been not just one such
3 shift from the common law to the chancellor's courts.
4 There have been two more, from the courts of law in equity
5 to administrative law, something I specialize in.

6 Justice Hecht's article on the vanishing
7 jury trial manages to find one concrete explanation for a
8 big part of the big drop in jury trials, the 1989 reform
9 of worker's compensation that took lawyers largely out of
10 the process of litigating whether an injury occurred to a
11 worker in the scope and the course of his or her
12 employment, because that reform was made because the
13 involvement of lawyers was costing so much money, eating
14 up so much total money out of the system that the premiums
15 were such that employers decided they didn't want to buy
16 worker's comp insurance if it cost that much. Our costs,
17 the system costs of our system of providing jury trials
18 drove our customers out of that business to the point
19 where the Legislature declared it was a crisis and the
20 only way to solve it was to give it to an administrative
21 agency.

22 And then there's the fourth way, which is to
23 arbitration, which is the one we've been talking about a
24 lot of us here anecdotally. I think it's happening; and I
25 also think it's now starting to turn back the other way as

1 people are realizing that arbitration -- at least that
2 the, you know, AAA kind of system with no appeal works too
3 far to the other side, you get too much speed and not
4 enough justice and no assurance of justice; and the
5 opportunity is open for us as a judicial system to offer
6 those folks a streamlined in time and cost and targeted in
7 venue or other assurances of other reliability of outcome
8 choice that these businesses can make when they're
9 negotiating these big contracts.

10 We might or might not want to offer that
11 system, but if you told me, "Pete, I'm interested in that
12 idea if, but only if, you've got some data on the number
13 of people who have left the system and gone to arbitration
14 and why they've left and whether they would come back if
15 we offered that," I can't get you that data, and I am
16 skeptical of the notion that -- the idea I'm very much in
17 favor of doing, that Ralph was talking about
18 county-by-county for the problems in those counties is
19 going to get you that data. I don't know how you get data
20 on how many -- you could certainly collect data -- and
21 maybe Bonnie can tell us if we're planning to start in the
22 future through OCA -- how many cases go out of the system
23 on an arbitration motion, but that, of course, never tells
24 you the ones that never really went into the system in the
25 first place because the parties agreed they did, too, have

1 a binding arbitration clause and one of them promptly
2 invoked it and nobody said "boo." I don't know how you
3 get that data, but if that's the issue we're supposed to
4 grapple with and we ought to have data before we do it,
5 the subcommittee shouldn't be asked to do that. Someone
6 else should.

7 CHAIRMAN BABCOCK: Justice Pemberton and
8 then Judge Yelenosky, Harvey.

9 HONORABLE BOB PEMBERTON: Just a historical
10 observation kind of from my rules attorney days. This
11 concern, big picture concern, with cases moving out of the
12 system, has been something I believe the committee or at
13 least task forces of the Supreme Court have been concerned
14 with probably for 20 years. As I recall, and Judge Hecht
15 can speak to this, on the heels of the Legislature's
16 enactment of the ADR statute there was a concern of a push
17 at least in the Legislature that the system is not working
18 and we need to think of other ways of getting disputes
19 resolved. The Court appointed various task forces on
20 things like discovery rules reform. There was some
21 process, some thinking that went into what are the
22 problems and how do we fix them. That was the origins of
23 those task forces. They did reports. I know this
24 committee studied these issues extensively, so some of
25 this ground we're talking about today may well have been

1 plowed, and it might be useful to consult those resources.

2 CHAIRMAN BABCOCK: Yeah. Good point.

3 Harvey.

4 HONORABLE HARVEY BROWN: It seems to me we
5 either have to go the route of anecdotally deciding this
6 -- and if we do it anecdotally, I think we've heard a
7 pretty strong consensus that this is not the solution. If
8 we don't want to do it anecdotally then I echo Pete's
9 comments. This really needs careful study, and I don't
10 think we're equipped even within a subcommittee to do
11 that. It seems to me that you're going to have to have a
12 survey done, which is almost going to have to be
13 professionally done, and finding the people for that
14 survey is not going to be easy. It's not like the AAA is
15 going to say, "Here's our list. We want you to come take
16 all our customers." I mean, we're going to have to dig to
17 get that data, and it's going to be hard to dig that data
18 up.

19 So I think that's something the Court needs
20 to decide, does the Court want that type of data. If so,
21 somebody is going to have to pay for it. It's going to
22 have to come out of somebody's budget. I don't think it's
23 something that we can just have somebody flippantly or
24 quickly do. I think there are a lot of reasons people go
25 to arbitration. That's really what we're talking about,

1 it seems to me at the end of day, is why are people going
2 to arbitration. You can read lots of articles about them,
3 but not many of them really give strong statistical
4 reasons as to why people are going to arbitration, so if
5 we're going to have a major change in the system, I think
6 it needs a major study that is funded.

7 CHAIRMAN BABCOCK: Good point. Judge
8 Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: Well, as I
10 understood our charge and the term "rocket docket," it
11 ends with trial, and as Sarah mentioned --

12 HONORABLE SARAH DUNCAN: It ends with what?

13 HONORABLE STEPHEN YELENOSKY: Trial.

14 HONORABLE SARAH DUNCAN: Trial.

15 HONORABLE STEPHEN YELENOSKY: Yeah. I mean,
16 as Sarah mentioned, there is the appellate system; and we
17 didn't even understand we were looking at that, although
18 we talked about it and supposed surveys show that people
19 going to arbitration have a love/hate relationship with
20 appeal, which is they like it, but they don't like perhaps
21 the time that it's taking; and I don't know anything about
22 capacity in the appellate courts; but that's a completely
23 different issue that we hadn't been asked to look at. Is
24 that right, Jeff?

25 MR. BOYD: Well, we talked about whether

1 that was within the charge. It had not been discussed.
2 Some committee members thought it ought to be looked at,
3 others thought it -- subcommittee members thought it ought
4 to be looked at, others thought it shouldn't, and I
5 contacted Chip and Justice Hecht at the subcommittee's
6 request, and both of them said, yeah, include it, but we
7 have not looked at it as a subcommittee.

8 CHAIRMAN BABCOCK: Yeah, to be more precise,
9 Jeff contacted me, I contacted Justice Hecht. Justice
10 Hecht said, "Yes, look at it."

11 HONORABLE STEPHEN YELENOSKY: Well, we
12 haven't, and the second thing was I had mentioned the lag
13 between reality and the continuing belief of reputation.
14 There is also a lag between our studying and actually
15 implementing anything, and our understanding of people
16 going to arbitration is some people are saying now, well,
17 that's shifting back. By the time we study this and make
18 recommendation we may want a rocket docket because we have
19 too much again, so I mean, we're operating on an old
20 reputation and belief that is old and we're having to
21 predict the future because anything we do is going to be
22 sometime from now.

23 CHAIRMAN BABCOCK: I was told the other day,
24 but this is truly anecdotal, I don't know if it's fact or
25 not, but that the AAA was considering trying to get some

1 legislation or some way of creating a right of appeal from
2 an arbitration award. Anybody heard that?

3 MR. HAMILTON: Part of 1204, isn't it?

4 MR. FULLER: No. There is a bill pending in
5 the Legislature that's basically trying to amend the Texas
6 statute pertaining to arbitration to apply for a right of
7 appeal.

8 CHAIRMAN BABCOCK: All right. And then, of
9 course, that's one of the big complaints against
10 arbitration, is that you can get this bizarre, crazy,
11 nutty award and there's nothing you can do about it, and
12 that may be a reaction to that, which, if true -- do you
13 know who's behind that bill?

14 MR. FULLER: TADC.

15 CHAIRMAN BABCOCK: Really?

16 MR. FULLER: With support from -- I'm not
17 sure where TTLA is on that or not. I think at least
18 they're not opposed to it.

19 MR. PERDUE: What's the bill number of that?

20 MR. FULLER: There was hearing -- I think
21 it's Dan Gattis -- no, in the Senate I think Royce West is
22 looking at it. In the House it may be Gattis, but I think
23 they had a hearing on it last week. Katie Babellini from
24 Houston went in and testified on it.

25 HONORABLE STEPHEN YELENOSKY: Well, I hope

1 we have a discussion about that, because that poses the
2 whole philosophical issue if we're going to have a
3 different parallel system where arbitration decisions are
4 reviewed just like an elected judge's decision and who
5 would want that. They have something like that in
6 California, but I hope we have a long discussion about
7 that because that's a fundamental issue.

8 MR. LOW: When you start looking at reasons
9 why people leave, I mean, look around the table. How many
10 lawyers in their contingent fee contract have an agree to
11 arbitrate? It started with lawyer bashing. I wouldn't
12 feel comfortable going before a jury a client suing me. I
13 would rather arbitrate, unless it's in Jefferson County,
14 and so why would you -- so everybody is going to have
15 their own reasons, and it's going to be self-interest.

16 HONORABLE JAN PATTERSON: But you believe in
17 justice, right, Buddy?

18 MR. LOW: Oh, above all.

19 CHAIRMAN BABCOCK: Carlos.

20 MR. LOPEZ: It's funny because I'm afraid to
21 say it in this room, but, you know, I do a lot of
22 arbitration, a lot of AAA arbitration, too, and they're
23 having the same catharsis about how can we improve our
24 system, what's good about what we do, what's bad about
25 what we do, and how can we get more people; and some of it

1 is philosophical and benign. Other is just profit-driven
2 of just it's business, how do we get more users. That
3 system is going through the same thing everybody else is
4 going through. That's just a comment.

5 I don't necessarily disagree that our
6 charge -- I mean, we assumed I think that our charge was a
7 rocket docket may or may not be one way to improve justice
8 generally, go look at it, or is our charge -- is our
9 subcommittee the improvement of justice generally in the
10 subcommittee, one possible way of which among many might
11 be a rocket docket, because the second one is huge; and
12 there's all kinds of different things you can do to
13 improve justice that don't have a darn thing to do with
14 rocket docket. I have got a bunch of goofy ideas about
15 court-appointed experts rather than the battle of, you
16 know, paid, you know, experts who may or may not be
17 prostituting themselves for the opinion they've been asked
18 to provide, as an example. Should that be talked about or
19 is that -- or are we just rocket docket? See what I'm
20 saying?

21 CHAIRMAN BABCOCK: Yeah.

22 MR. LOPEZ: And if it's the second, if it's
23 the latter, which is a huge deal, then let's just
24 acknowledge that we're biting off a pretty big chunk, and
25 let's figure out whether this tiny little subcommittee is

1 equipped to do that.

2 CHAIRMAN BABCOCK: Yeah. Fair enough.

3 Sarah.

4 HONORABLE SARAH DUNCAN: And I would like to
5 add to it, Carlos, I would like to get the family law
6 cases out of litigation, the litigation context, which is
7 highly controversial and would probably never fly, but I
8 think Carlos put it very well. Is this subcommittee and
9 this committee supposed to figure out how to improve the
10 justice system or is it just supposed to figure out how to
11 design and implement a rocket docket to cure a problem
12 that we don't know exists?

13 MR. BOYD: And I'd rather do the latter.

14 HONORABLE SARAH DUNCAN: Of course you
15 would.

16 MR. BOYD: As hard as that would be. I want
17 to make one comment just because I haven't heard anyone
18 else make it, and that is even to the extent that the
19 broader issue isn't delay but is why aren't people using
20 the system like they used to, I want us to hesitate
21 calling that a problem and push back a little on that
22 concept, because I'm not sure that the fact that people
23 are resolving issues without litigation is necessarily a
24 bad fact. Now, if it's because they're getting cheap,
25 poor justice through some alternative system then that's a

1 problem, because our government and our judicial system
2 ought to be helping provide that.

3 CHAIRMAN BABCOCK: Or expensive, poor
4 justice.

5 MR. BOYD: Well, and it may be expensive,
6 poor justice.

7 HONORABLE STEPHEN YELENOSKY: Or if it's
8 costing the common law, because we don't have --

9 MR. BOYD: But, you know, the reality is --
10 and I -- through this process I've come to the conclusion
11 that the problem with the system, quote-unquote, isn't
12 delay, it's cost, and that's not always the case. I've
13 got clients that can pay me as much as they need, but
14 they've got to get it solved right away because the
15 project's got to get finished. So it's not always, but
16 for the most part it's cost, and I always like to ask the
17 question of others in private practice, "How many of you
18 could afford yourself?" Because I could not afford
19 myself, and I make a lot of money, but I certainly
20 wouldn't want to afford myself, want to have to afford
21 myself, and so a lot of what I do in practice is help
22 clients find a way to solve the problem without going to
23 litigation because it's usually the better business
24 judgment or family decision or whatever.

25 That's not necessarily a bad thing, and I

1 don't think we should automatically assume that it is, but
2 to the extent that in a case-by-case situation, not being
3 able to find -- not being able to get a good resolution
4 through the judicial system, and I think I'd like to see
5 us figure out a way to address costs, but as I think
6 through that in my mind I think, boy, you talk about a big
7 issue, I don't know that there is a way to address costs,
8 much less that this subcommittee or this committee could
9 find that way and implement it, but to me that shows kind
10 of how broad the issue is, at least in my mind.

11 CHAIRMAN BABCOCK: Pete.

12 MR. SCHENKKAN: I think the issue, cost is
13 often a bigger issue than delay, and I think fear of an
14 arbitrary outcome is often even bigger than cost, but that
15 any one, two, or all three could be factors in any
16 particular case in terms of people having reasons for
17 leaving the system. If what we want to do is get some
18 more data before we try to figure out if there is a
19 problem that a rocket docket might be a solution to or
20 before we decide if we have a problem that maybe needs
21 some other solution, I hate to offer Justice Hecht and
22 you, Chip, no suggestions about how to do that other than
23 we don't want to, we don't think we're qualified. I don't
24 want to, and I don't think I'm qualified, but --

25 CHAIRMAN BABCOCK: Well, we'll stipulate

1 then.

2 MR. SCHENKKAN: Thank you then. How about
3 this as a possibility? Could we get the cooperation from
4 maybe two sections of the State Bar, the litigation
5 section and the corporate law section, and do an
6 appropriate survey to their membership? Maybe they can
7 even do it with e-mail. I mean, everybody has e-mail
8 lists for those sections, and it's obviously voluntary,
9 and it will be self-selection in terms of who chooses to
10 answer, but ask some questions about -- you know,
11 questions like are you experiencing delays in cases in
12 your practice; what categories of cases are those; choices
13 as to what the causes of those, lack of capacity on the
14 judges or whatever some selected other ones are; for the
15 corporate lawyers especially, maybe are you and your
16 clients, you know, choosing arbitration clauses instead of
17 letting it go to litigation; and why is that, is it fear
18 of delay, cost, uncertainty of outcome?

19 Maybe you could ask if you were offered a
20 voluntary choice that would only apply if you and the
21 other -- you know, the business entity on the other side
22 of the deal represented by the other lawyer agreed to it
23 in the contract in the first place that it went to a
24 rocket docket in the Texas court system in the following
25 parameters, would you prefer that to the arbitration

1 options or would you like to have that as a possibility?

2 I could see designing some surveys like that, but that
3 needs the help of somebody with a big membership list and
4 the right kinds of people and the ability to send it to
5 them. Of course, ideally they ought to take ownership of
6 the project and just give us the results.

7 CHAIRMAN BABCOCK: Yeah, Sarah.

8 HONORABLE SARAH DUNCAN: And I think part of
9 -- two comments. One, people won't vote for who they want
10 to be State Bar president. I don't have high hopes of a
11 high turnout on the survey, but, two, if there's going to
12 be a survey, which might be a very good idea despite low
13 turnout, I think part of the question needs to be delay in
14 the appellate courts. It may be that everybody is getting
15 a trial right when they want to get a trial. It's just
16 that when you've got a case where the record is -- you
17 know, when I got to Locke Liddell I thought there was a
18 supply room across from my office. Actually, it's the
19 record in one case, and it reminds me of a case I used to
20 work on. I was looking at condos in the Brown Building
21 where the entire discovery was one whole office in the
22 Brown Group Building.

23 When you dump something like that on Justice
24 Jennings' doorstep to decide on appeal and consume him and
25 his staff for the better part of a year, you're going to

1 get enormous delay in your case, and it has nothing to do
2 with whether you could get a jury trial timely.

3 HONORABLE TERRY JENNINGS: My docket is
4 current, by the way.

5 HONORABLE SARAH DUNCAN: Just wait, you're
6 going to get this case.

7 CHAIRMAN BABCOCK: There's an appeal coming
8 that you don't know about.

9 HONORABLE TERRY JENNINGS: May I make a
10 comment?

11 CHAIRMAN BABCOCK: Yeah, Justice Jennings.

12 HONORABLE TERRY JENNINGS: Well, in response
13 to some things that Jeff said, some other comments that
14 were made, I wonder if we're kind of looking at this
15 backwards in that, you know, we're trying to find out what
16 the problem is. I think we all know that this is a
17 multifaceted problem. There is, you know, delay, cost,
18 expense. Maybe we ought to be studying what does seem to
19 be working, and, again, I know there is apples and oranges
20 here between the criminal system and the civil system
21 because there are so many different causes of actions and
22 so forth and we are dealing with the common law, not penal
23 statutes, which are pretty easy to follow and you can get
24 that kind of stuff before a jury fairly easily, but cases
25 are being tried in criminal courts.

1 And, you know, as far as this idea of, you
2 know, is this a system worth saving, Yelenosky pointed
3 out, well, you know, what's really happening here is when
4 you're not having jury trials -- and Justice Hecht said
5 this at our bench/bar conference. When you're not having
6 jury trials those things are not being appealed to the
7 appellate courts; and if they're not going up to the
8 appellate courts, that's what's hurting the growth of the
9 common law. So, I mean, do we want to have a system where
10 juries make the important decisions, fact findings, and do
11 we want to preserve the common law?

12 I would hope that everyone here agrees that,
13 you know, in addition to being all for justice, we're for
14 preserving the common law and preserving the idea that
15 juries make these important decisions, and my point is, is
16 I don't know that a rocket docket is going to do that. I
17 think we need to look at streamlining the system to make
18 it -- one of the things we heard at our bench/bar
19 conference in our breakout sessions was fighting over
20 discovery disputes, that, you know, you could spend
21 months, if not years, fighting over discovery matters and
22 going in over sanctions hearings and things like this.

23 So a lot of this, you know, blame comes
24 right back to us in how we conduct our practice and our
25 business, and the judges are as guilty as well as far as

1 delay and not getting things done. Some judges get cases
2 to trial a lot more efficiently than others. Some judges
3 have reputations for not trying cases, but I certainly
4 think it's definitely worth looking into. I don't know
5 that we're the right committee to do it, but I would hope
6 that we all in addition to being for truth and justice
7 we're for preserving the common law, preserving jury
8 trials, and maybe looking at other systems and how they
9 are working efficiently, and maybe we can streamline our
10 system to make it less expensive and to decrease delay.

11 CHAIRMAN BABCOCK: Buddy.

12 MR. LOW: But there's a lot to be said about
13 reducing discovery, a lot to be said about discovery. We
14 fought months over discovery and ended up with a document
15 where the defendant says that this is serious problem,
16 don't worry, the customer will think it's his mistake.
17 That was a critical document. We don't know it exists, so
18 sometimes it does take a lot of discovery and effort to
19 get the truth. I mean, you can't overlook that.

20 CHAIRMAN BABCOCK: Yeah. Yeah. Judge
21 Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Well, I just
23 wanted to expand on that point. I mean, I did mention the
24 cost of the common law. I want to tie it in with earlier
25 there was some talk about getting the business back in the

1 courts, and I know that that hopefully is alluding to
2 that, because it certainly is judges -- I mean, purely
3 from a purely personal perspective we're better off if
4 there's less coming in; but we get paid the same, not like
5 an arbitrator; and our concern is, is that, is the common
6 law; and if it turns out, as Jeff says, that there's less
7 in the courts because people are finding ways to resolve
8 things understanding what the common law is, and to quote
9 the word "common," that we have some sort of universal
10 sense of justice, but they know what it is and they go out
11 and resolve it without coming to court, that's one thing;
12 but instead if what's happening is that we're getting all
13 different kinds of decisions that aren't common across the
14 state because they're not appealed, then that's a
15 different problem that is a significant cost to justice.

16 CHAIRMAN BABCOCK: Okay. Judge Christopher.

17 HONORABLE TRACY CHRISTOPHER: Well, just on
18 the little bit on the idea of surveys. I mean, if you
19 take a survey of clients, any client, personal injury
20 client, corporate client, and said, you know -- they would
21 say it takes too long to get a case to trial, even if the
22 case goes to trial in a year. I mean, that's too long to
23 them. To most lawyers, a year is, you know, perfect,
24 because, you know, I've got other cases, I've got to do
25 this, I've got to do that. You know, maybe nine months,

1 but a year, that's perfect, but the clients will not think
2 that. It's the same thing with discovery. All right.
3 Clients for the most part don't like discovery. They
4 don't like to spend their people's resources to produce
5 documents, but it's a necessary evil, as Buddy points out,
6 sometimes, to, you know, find the smokeing gun.

7 So I'm not really sure what we're going to
8 accomplish with a survey, but if we do do it, I would
9 definitely suggest not doing an e-mail survey, having just
10 done one recently. I got 10 responses out of 450 judges,
11 so, you know, my suggestion is that you like take a survey
12 to the advanced civil trial seminar where there is 400
13 civil trial lawyers and just kind of beat on them through
14 the three days to turn it in.

15 CHAIRMAN BABCOCK: Your ticket to leave the
16 room is your completed survey.

17 HONORABLE TRACY CHRISTOPHER: Right. Right.

18 MR. SCHENKKAN: Get one extra hour of CLE
19 credit.

20 HONORABLE TRACY CHRISTOPHER: There is
21 probably some, you know, corresponding, you know, business
22 meeting that would be more useful. We get flooded with
23 e-mails now, and, you know, it's a cheap way to do things,
24 but it --

25 HONORABLE STEPHEN YELENOSKY: And it's worth

1 the cost.

2 HONORABLE TRACY CHRISTOPHER: Your response
3 rate is going to be really low.

4 CHAIRMAN BABCOCK: Yeah. Well, I've got a
5 couple of thoughts. One, it seems to me we all have a
6 stake and to some extent are stewards of the common law
7 jury system, and we ought to collectively, whether we're
8 on this committee or not, want to ensure its continuation
9 and its viability, because I think we would all agree that
10 the jury system is a unique feature of our democracy and
11 has served us very, very well for hundreds of years; but
12 the Court, of course, is the true -- the Supreme Court is
13 the true steward and guardian of this system; and if there
14 is huge flight of participants from the system, not only
15 the users, but prospective jurors are fleeing the system,
16 as has been well-documented, it seems to me that the Court
17 has a vital interest in trying to figure out -- just as
18 the AAA and the arbiters are trying to figure out -- how
19 to make their system better and more attractive to users,
20 and that in a broad sense is what this is about.

21 Second point, which is related but not the
22 same point, is that this committee and the -- and our
23 Court has done work over the past 15, 20 years, that
24 really is some of the best stuff that's done in the
25 country. I mean, I'm on another committee with a group in

1 Colorado that studies rules all over the country, and
2 Justice Hecht is on the Federal rules committee, and our
3 discovery, that project that we did, is widely held up as
4 a very, very effective, good way to conduct discovery, a
5 step -- a generational leap in how you do discovery. Our
6 un -- our rule on unpublished opinions was the model for
7 what finally the Federal courts have now implemented, so I
8 mean, we do really good stuff, and I think that the Court
9 is looking to our committee as a resource to see if
10 there's a way we can fundamentally change in a good way
11 the system to make it better for users.

12 Now, I can understand the subcommittee's
13 frustration because you say, well, what's our charge.
14 Well, we sort of don't know what the charge is in one
15 sense. We sense that there's a problem, and we label it
16 the solution is rocket docket, let's look at that, and you
17 have three questions, which you kind of have answered,
18 although you say there's pros, there's cons, the data
19 doesn't really support anything. Let me suggest this to
20 try to move this process along, and I think this will
21 synthesize everybody's comments. Why don't I suggest
22 that, Jeff, you and maybe Justice Patterson, who is the
23 cochair, or Pete or Justice Bland, whoever wants to do it,
24 why don't we sit down with Justice Hecht and Jody and the
25 Chief and see if the Court can refine better what we're

1 looking at? I think it's important what you-all have
2 done.

3 I think this discussion today has been
4 terrific and really helpful and enlightening, and you
5 know, if we can turn it into action, even if our action is
6 to recommend inaction, I think that's a valuable service
7 to the Court that we've done. So, Jane, you can go back
8 to eating lunch for the next week or two and on Thursdays,
9 and we'll try to set up, Jeff, something soon, and let the
10 Chief have the benefit of reading this and Justice Hecht,
11 the parties that have not been able to attend, and we'll
12 go from there. Does that strike you as an okay way of
13 proceeding?

14 MR. BOYD: That's great. Thanks.

15 HONORABLE SARAH DUNCAN: Chip?

16 CHAIRMAN BABCOCK: Yeah, Sarah.

17 HONORABLE SARAH DUNCAN: Something that just
18 occurred to me just for you-all to consider is talking to
19 the section chairs. Talk to the chair of the family law
20 section, talk to the chair of --

21 CHAIRMAN BABCOCK: Does that mean we've got
22 to talk to Orsinger?

23 HONORABLE SARAH DUNCAN: Yeah. No, I don't
24 think he's the chair anymore.

25 CHAIRMAN BABCOCK: Okay, good.

1 HONORABLE SARAH DUNCAN: And they might know
2 the best way to survey their members or -- because it's
3 that type of evidence that I think is going to inform
4 you-all's discussion.

5 CHAIRMAN BABCOCK: Yeah. That's a great
6 idea.

7 HONORABLE TERRY JENNINGS: Can I make a
8 suggestion?

9 CHAIRMAN BABCOCK: Justice Jennings.

10 HONORABLE TERRY JENNINGS: The Court has
11 used blue ribbon panels before to check into things, and
12 it just occurs to me that what the subcommittee is being
13 asked to do might be beyond the resources they have to do
14 it. This might be a project that the Court might consider
15 appointing a blue ribbon panel to look into.

16 CHAIRMAN BABCOCK: This is a blue ribbon
17 panel.

18 HONORABLE TERRY JENNINGS: I know.

19 HONORABLE SARAH DUNCAN: What resources do
20 you think they're going to have?

21 HONORABLE TERRY JENNINGS: You know, like
22 there was the Jamail panel that made those suggestions a
23 few years ago, and something along those lines, because
24 that's an awful lot to ask these folks timewise.

25 CHAIRMAN BABCOCK: Well, as a member of the

1 Jamail committee, I will tell you that these guys have
2 done as much work already as we did, so --

3 HONORABLE TERRY JENNINGS: Just a
4 suggestion.

5 CHAIRMAN BABCOCK: Yeah, okay. Any other
6 comments? Jane, you hungry?

7 HONORABLE JANE BLAND: Yes.

8 CHAIRMAN BABCOCK: Let's have lunch then.

9 HONORABLE JANE BLAND: You always wait until
10 after noon. I'm so excited, it's noon.

11 (Recess from 11:59 a.m. to 12:48.)

12 CHAIRMAN BABCOCK: Bill Dorsaneo is absent
13 by illness.

14 HONORABLE SARAH DUNCAN: He's under the
15 weather, uh-huh.

16 CHAIRMAN BABCOCK: Not feeling great, but he
17 has tagged Sarah Duncan to take his place, and she will do
18 it, as he's told me, better than he would.

19 HONORABLE SARAH DUNCAN: He didn't tell you
20 that, and if he did, it was a lie.

21 CHAIRMAN BABCOCK: I got that vibe from him.

22 HONORABLE SARAH DUNCAN: It will at least be
23 quicker because I know so much less than he does about
24 what has been done. As a for instance, on page two of his
25 memorandum of April 25th, you-all all have that, all that

1 was done on 20, TRAP 20, was to further conform it to TRAP
2 145, and one of the members of the subcommittee can
3 volunteer what that change was because I don't know. This
4 was Bill's further tinkering.

5 Well, moving on...

6 CHAIRMAN BABCOCK: Yeah, we talked about
7 this a lot.

8 HONORABLE SARAH DUNCAN: We talked about it
9 a lot, and I think he may have changed like one word.
10 Maybe it's "not contestable." I'm not sure if that's
11 spelled correctly.

12 MR. HUGHES: And it's not spelled correctly.

13 HONORABLE SARAH DUNCAN: Which we might
14 could fix, but I think that may be the only change from
15 our last meeting.

16 CHAIRMAN BABCOCK: Okay. Any -- yeah,
17 Justice Gaultney.

18 HONORABLE DAVID GAULTNEY: Are you on page
19 two of Rule 20, you say?

20 HONORABLE SARAH DUNCAN: 20.1.

21 CHAIRMAN BABCOCK: Rule 20, when party is
22 indigent.

23 HONORABLE SARAH DUNCAN: 20.1.

24 HONORABLE DAVID GAULTNEY: Right.

25 HONORABLE SARAH DUNCAN: And, Jody, you

1 think that was all that was changed?

2 MR. HUGHES: No.

3 HONORABLE DAVID GAULTNEY: There was an
4 addition to this to conform in (12) that just references
5 38.5(b) which applies to court recorders. It's just
6 trying to merge the two rules. Jody just mentioned this
7 to me earlier that perhaps the committee ought to look
8 at -- we didn't do it this time -- mentioning court
9 recorders in 20.1(d) and (e) as well, but we would also
10 have to look at the costs definition because the cost
11 definition between 38.5 and 20.1 are different, so I just
12 wanted to put that on the record so to speak, but that is
13 what that change is there, is 20.1(b)(12) is simply a
14 reference to the court recorder rules.

15 HONORABLE SARAH DUNCAN: But that's talking
16 about the parties' lack of skill.

17 HONORABLE DAVID GAULTNEY: No, you were
18 asking if there were any changes on page two other than
19 the "not contestable."

20 HONORABLE SARAH DUNCAN: Oh, I see.

21 HONORABLE DAVID GAULTNEY: And so I was
22 simply pointing out that there was one additional change,
23 and that's the additional change.

24 CHAIRMAN BABCOCK: Do you have a problem
25 with the change?

1 HONORABLE DAVID GAULTNEY: No, no. I
2 suggested it.

3 HONORABLE SARAH DUNCAN: I see.

4 HONORABLE DAVID GAULTNEY: I'm just making
5 the committee aware of the change.

6 CHAIRMAN BABCOCK: Okay. Anybody have any
7 comments about these two changes? All right. Well, then
8 let's -- Jody, do you have any comment about it?

9 MR. HUGHES: I have one comment, which is to
10 pass on -- I got an e-mail last night from David Dubose
11 and Alessandra Ziek, two staff attorneys, long-time staff
12 attorneys of the Third Court of Appeals, both very
13 knowledgeable and thoughtful about appellate issues, and I
14 brought some copies of this to the meeting, and I have
15 just had a chance to kind of read through these. They had
16 comments about 20.1 that were sort of unsolicited, not
17 directly related to this, but they were saying if you-all
18 are going to be changing this rule, here's some things to
19 think about.

20 Their comments deal more with the Higgins
21 issue and sort of what I think is maybe an intractable
22 problem of setting a deadline for filing something but at
23 the same time saying, "But really, if you don't meet it by
24 the deadline then the court has to remind you, and we
25 can't dismiss it without it," but I think their comments

1 might be worth thinking about, or if this was something
2 to -- I'm not saying necessarily to push it till next
3 time, but --

4 CHAIRMAN BABCOCK: Well, we talked about
5 Higgins a lot. We beat Higgins almost to death, but maybe
6 there's still life in it. Do you think is it so
7 fundamentally different than our discussion that we ought
8 to talk about it some more, or would you just propose
9 providing the Court with this additional input that came
10 after our discussion?

11 MR. HUGHES: I would suggest just providing
12 the input. My analysis of their suggestions about Higgins
13 is I'm not sure that there's any way to address them,
14 consistent with what we've talked about, just because
15 they're basically saying -- one of the comments is if
16 you're -- they're suggesting taking the deadline out of
17 this, because really there is no deadline after Higgins,
18 but I'm not sure that's -- my own thought is I'm not sure
19 that's workable. I think it's still better to put a
20 deadline in there so you have a default that most people
21 follow rather than just put in the rule "file it within a
22 reasonable time" because you're not going to have a --

23 HONORABLE SARAH DUNCAN: Well, and the
24 clerks can't calendar "reasonable time."

25 MR. HUGHES: Right.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE SARAH DUNCAN: If there's a
3 deadline they can calendar, it will generate a letter
4 saying, "You need to do something about this."

5 CHAIRMAN BABCOCK: And we way talked about
6 that, so --

7 MR. HUGHES: I just wanted to bring it to
8 you.

9 CHAIRMAN BABCOCK: No, no, no, that's good.

10 HONORABLE TOM GRAY: You can respond by
11 sending them back to the discussion from last time.

12 CHAIRMAN BABCOCK: Well, and obviously the
13 Court might be interested in what they have to say. Just
14 because we recommend something doesn't mean the Court is
15 going to go along with our recommendation, so --

16 MR. HUGHES: And this is unrelated to the
17 two changes that were made that are new in this version.

18 CHAIRMAN BABCOCK: Right. Good. All right.
19 What's next? What's next, Sarah?

20 HONORABLE SARAH DUNCAN: Page four, back to
21 supersedeas. Elaine's note is at the bottom, and you
22 might want to read it if you haven't, it basically says
23 that these proposals haven't been voted on by the full --
24 presented to or voted on by the full committee; and the
25 problem, as I'm sure Bonnie can attest, is the clerks do

1 not want to be charged with measuring the sufficiency of
2 an affidavit in support of a motion to set alternative
3 security or to reduce the amount of security that's
4 required; and what some of them are now doing is just
5 saying, "Everything is good enough because I'm not
6 competent or comfortable measuring the sufficiency of the
7 net worth affidavit." Others I think have said, "Just go
8 to the judge and get an order, because I'm not going to do
9 it." But either way -- or in the first way, if they just
10 automatically accept the net worth affidavit, then
11 supersedeas enforcement of the judgment is going to be
12 suspended even when it shouldn't have been.

13 I think Elaine's view is that that is the
14 better alternative, and she says in that last sort of
15 paragraph, "The trial court always has the authority
16 pursuant to TRAP 24.2(d) to enjoin the judgment debtor
17 from dissipating or transferring assets outside the normal
18 course of business, and TRAP 24.1(e) empowers the court to
19 make any other necessary orders -- orders that are
20 necessary to protect the judgment creditor against loss or
21 damage that the appeal might cause," and so that's why (1)
22 now has been rewritten to say a trial court clerk has to
23 receive and file a net worth affidavit. They can't say,
24 "I'm not going to file it because I deem it insufficient."
25 They have to receive it and they have to file it. If it's

1 filed, it's prima fascia evidence of net worth, but that's
2 subject to someone filing a contest pursuant to subsection
3 (2) at the bottom of page five.

4 CHAIRMAN BABCOCK: Okay. Any discussion
5 about (1) or (2)? Yeah, Harvey.

6 HONORABLE HARVEY BROWN: I think this is
7 very good. I mean, I have been through this fight, and
8 there was a lot of uncertainty, and I commend the effort.

9 HONORABLE SARAH DUNCAN: And that was one of
10 Elaine's points, is that when you're in this situation
11 what you need more than anything else is certainty. You
12 need to know if it's -- if enforcement is suspended or
13 it's not.

14 CHAIRMAN BABCOCK: Gene.

15 MR. STORIE: I think this is maybe a related
16 question, but would you be able to execute on the bond if
17 there's a challenge and the court determines that the bond
18 was insufficient? Because I don't think it's in the
19 conditions of liability now in subsection (d)(1). See
20 what I'm saying?

21 HONORABLE SARAH DUNCAN: Huh-uh.

22 MR. STORIE: Suppose you have a judgment for
23 100 million. Defendant says, "I'm only worth 20 million,
24 here's my 10 million-dollar bond." It's contested by the
25 plaintiff, and the court says, "No, you're really worth

1 50," so you would need to put up 25, but do you get to
2 execute on the original 10 million?

3 HONORABLE SARAH DUNCAN: No. Because
4 execution is suspended so long as that bond is in place,
5 absent further order of the court.

6 MR. STORIE: Right. And so if the court
7 orders that that is not sufficient to supersede the
8 judgment --

9 HONORABLE SARAH DUNCAN: If the judgment
10 debtor doesn't comply with the trial court's order within
11 the time provided, the judgment can be enforced.

12 MR. STORIE: Right.

13 HONORABLE SARAH DUNCAN: Now, whether the
14 bond is still in place is between the judgment debtor and
15 the bonding company. Right?

16 CHAIRMAN BABCOCK: Justice Bland.

17 HONORABLE JANE BLAND: But you have -- under
18 this proposed rule you have 20 days before anybody can
19 enforce the judgment, period. It's for you to seek
20 further relief and seek a stay, so I don't think there
21 will be a time -- you're worried about there being some
22 sort of a gap where they might be able to come out and
23 execute? But I think if the trial court's order is not --
24 is one that you're going to contest, whether it denied you
25 any relief or just gave you part relief, that order's

1 suspended for 20 days, that it will let you go and get
2 further relief.

3 MR. STORIE: It's maybe not a problem at
4 all. I guess it's more of a question. I'm just thinking
5 if you have a defendant who's able to get a 10
6 million-dollar bond and you're the plaintiff and you want
7 to -- and, again, that was insufficient to supersede the
8 judgment and we'll say that no corrective action was
9 taken, what happens to the 10 million-dollar bond? Does
10 it just go away? Because right now it seems to me the
11 plaintiff cannot look to that as part of the satisfaction
12 of the judgment in the meantime.

13 HONORABLE SARAH DUNCAN: Well, if I were the
14 defendant and I found out my 10 million-dollar bond wasn't
15 going to suspend enforcement on a 25 million-dollar
16 judgment and I can't put up the additional security that
17 the trial court orders, I'm not going to continue paying
18 premiums for a bond that won't suspend enforcement.

19 MR. STORIE: Right. So then the plaintiff
20 has lost the opportunity, perhaps, to go after \$10 million
21 because --

22 HONORABLE SARAH DUNCAN: That's a whole
23 different problem. That's partial supersedeas, and that's
24 a whole different problem that this committee has --
25 subcommittee has never been asked to take on.

1 MR. STORIE: Okay.

2 HONORABLE SARAH DUNCAN: But we could.

3 MR. STORIE: Well, never mind.

4 HONORABLE SARAH DUNCAN: Partial supersedeas
5 has been a problem ever since I have been looking at
6 supersedeas.

7 CHAIRMAN BABCOCK: Justice Bland.

8 HONORABLE JANE BLAND: I don't think the
9 plaintiff has an opportunity to go after the 10
10 million-dollar bond period until the entire setting of the
11 bond is concluded.

12 MR. STORIE: Right.

13 HONORABLE JANE BLAND: So I don't think
14 they're losing anything because I don't think they
15 could -- they can't yank the 10 million, you know, and I
16 guess what parties usually do is move to withdraw the
17 bond, don't they? I mean, so --

18 HONORABLE SARAH DUNCAN: I'm sorry. What
19 was that last part?

20 HONORABLE JANE BLAND: Well, what they
21 usually do if the bond is no longer needed or is not
22 enough or whatever it is, they move to withdraw it.

23 HONORABLE SARAH DUNCAN: That's what I mean.
24 If I'm the defendant and the bond is not going to protect
25 me from enforcement of the judgment, I'm not paying the

1 premiums anymore. I'm going to make arrangements for it
2 to be withdrawn and -- or for it just not to be -- I guess
3 withdrawn is the right word.

4 MR. STORIE: Okay.

5 HONORABLE SARAH DUNCAN: But the partial
6 supersedeas is a whole different problem.

7 CHAIRMAN BABCOCK: Any other comments on
8 this Rule 24? Excuse me, not 24.

9 MR. HAMILTON: I have a question.

10 CHAIRMAN BABCOCK: Yeah.

11 MR. HAMILTON: Are we also changing
12 24.1(b)(1) where it says it has to be approved by the
13 clerk? Is it (2), to be effective a bond must be approved
14 by the trial court clerk?

15 CHAIRMAN BABCOCK: Carl, what -- say again
16 what the rule --

17 HONORABLE SARAH DUNCAN: But that's talking
18 about the bond. This is talking about the net worth
19 affidavit. Right?

20 MR. HAMILTON: Yeah, you're right, but the
21 bond still has to be approved by the clerk, though.

22 HONORABLE SARAH DUNCAN: This isn't changing
23 anything other than what is right here. Now, it may
24 change what the clerk will ultimately approve for a bond,
25 right? If the clerk is required by this rule to receive

1 and file a net worth affidavit no matter pretty much what
2 it says, then that net worth affidavit is -- can be a
3 basis for a reduced bond, and it may be that that net
4 worth affidavit will enable the judgment debtor to file a
5 bond that is significantly less than the judgment that the
6 judgment debtor is trying to supersede.

7 MR. HAMILTON: Okay. But if the clerks
8 don't want to approve the net worth affidavit --

9 HONORABLE SARAH DUNCAN: What we're saying
10 is you don't have to -- there is no approval process
11 that's going to be going on.

12 MR. HAMILTON: I know, but so if they have
13 abandoned that and all we have to do is file it, then
14 whether it's good or not good affidavit they're still
15 going to go ahead and approve the bond.

16 HONORABLE SARAH DUNCAN: Whether it's
17 sufficient.

18 MR. HAMILTON: Sufficient.

19 HONORABLE SARAH DUNCAN: It will be
20 sufficient if -- from the clerk's perspective it will be
21 sufficient if it's -- if there's a net worth affidavit
22 that supports the amount of bond that is filed, and if you
23 as the judgment creditor disagree with that amount then
24 you'll need to file a contest. But it will not be up to
25 Bonnie to do anything other than look at the judgment,

1 look at the net worth affidavit, and compute whether this
2 is the right percentage.

3 CHAIRMAN BABCOCK: Other comments? Okay.
4 Next?

5 HONORABLE SARAH DUNCAN: We'll do anything
6 for Bonnie.

7 MS. WOLBRUECK: Good.

8 CHAIRMAN BABCOCK: Did you get that? Bonnie
9 said "good."

10 HONORABLE SARAH DUNCAN: What Bonnie wants,
11 Bonnie gets. And you know why that it is. It's like that
12 little sign above my mother's sink that says, "If mama
13 ain't happy, ain't nobody happy." If Bonnie's not happy,
14 nobody's happy.

15 Who is JDH?

16 MR. HUGHES: That would be me.

17 HONORABLE SARAH DUNCAN: Oh.

18 MR. HUGHES: And I was going to ask you a
19 question, Sarah. I think there's two places on here where
20 I was making notes on this. The committee had asked
21 Elaine to go back and draft some new language, and to my
22 knowledge she hasn't had a chance to do that, and the
23 subcommittee hasn't had a chance to --

24 HONORABLE SARAH DUNCAN: That's my
25 understanding.

1 MR. HUGHES: -- consider anything, and I
2 actually wasn't sure if we were going to address 24 today
3 at all until after her changes she was going to come back
4 with. I mean, there may be some particular things to
5 consider, but I thought it was all going to be part of --

6 HONORABLE SARAH DUNCAN: I think it's
7 waiting on Elaine and she's in Prague, so --

8 MR. HUGHES: Right.

9 HONORABLE SARAH DUNCAN: So I don't think we
10 can do that.

11 MR. HUGHES: That was my understanding,
12 yeah, and I think Bill was planning to just kick it till
13 next time until Elaine gets here.

14 CHAIRMAN BABCOCK: Okay. So we're kicking
15 24 to next time? Is that what you're saying? Okay.

16 HONORABLE SARAH DUNCAN: So that takes us up
17 to seven and 34.6 and 35, which should be pretty
18 inconsequential. It's just putting in "court recorder,"
19 and then the one that might actually be controversial I
20 will turn over to Justice Jennings.

21 HONORABLE TERRY JENNINGS: Now?

22 HONORABLE SARAH DUNCAN: Yeah, go for it.

23 HONORABLE TERRY JENNINGS: Well, thank you.

24 HONORABLE SARAH DUNCAN: I just don't want
25 any controversy.

1 HONORABLE TERRY JENNINGS: Well, hopefully
2 it won't be too controversial. As everyone here knows, we
3 voted to -- under Judge Bland's suggestion to study
4 changing the rules to somehow either to, first of all,
5 provide the litigants with a chance to tell the court why
6 or how oral argument would be helpful to the court,
7 hopefully with the idea that the more judges seeing that
8 and being persuaded by such a statement that they might be
9 more inclined to have an oral argument. Then we went
10 further and studied the idea of the Federal rule, which
11 requires that the court in appellate panel before it
12 actually rejects having an oral argument, that the
13 appellate panel itself unanimously agree upon denying oral
14 argument.

15 And just a little background here, to try to
16 keep it short as possible, as you may recall, when Judge
17 Bland sent her letter to the committee we also had some
18 statistics in front of us. I don't think we have those
19 now, but just very briefly, there has been a steady
20 decline in oral arguments from 2001 to 2006, and just to
21 pick on our court, we went from 135 oral arguments in 2001
22 to a low of 47 arguments in 2004. Our sister court, the
23 14th Court of Appeals went from 429 oral arguments in 2001
24 to a low of about -- to a low of 94 arguments in 2005.
25 There were some other courts with more dramatic drops. As

1 some people may recall, Corpus Christi went from 172 oral
2 arguments in 2001 to 11 oral arguments in 2005.

3 There is a number of caveats in these
4 numbers and what they mean and how cases are counted and
5 so forth. When OCA does its statistics it doesn't really
6 count the number of arguments that were actually heard.
7 What it does is it counts the number of cases in which
8 argument was granted. So these numbers may be inflated
9 one way or another. One way they may be inflated in favor
10 of the courts, making the courts look better like they're
11 having more arguments, is that, well, if you count cases,
12 for example in Harris County, in criminal cases we don't
13 have counts. We have cause numbers. So if a criminal
14 defendant is charged with five different offenses, there
15 may be five cases. Well, the court, if the court sets
16 that case for argument, the court is going to get credit
17 for five arguments when really it only had one, so and
18 that's an OCA deal. That's how they count it. They just
19 count cases. Also, argument may be granted and then at
20 the last minute it's either waived or a party may ask for
21 a reset and the reset might be denied and then the case
22 submitted without argument.

23 Well, why are we having this problem? One
24 theory is -- at least one theory I have is we got away
25 from the old rule. Under the old rule you had a right to

1 an argument obviously, and that was back in 1997, but we
2 have a lot of new judges who have never operated under the
3 old rule and have a different mindset about argument; you
4 know, whereas some of the older judges who have been
5 around a lot longer who operated under the old rule might
6 be more argument-friendly. Another point is, is that we
7 have a very heavy workload. We're a very high volume
8 business, and there is a legitimate concern by a lot of
9 judges that having arguments slows down the process,
10 especially when the arguments are adequately handled in
11 the briefing and so forth, that if it's well laid out in
12 the briefs why do we need to have an argument, because
13 that's just going to take more time away from, you know,
14 accomplishing the task of moving cases and so forth.

15 So there is some legitimate reasons not to
16 have argument, but there is also some other things that
17 may be factoring into why we're not having argument that
18 might be of some concern, and one is the growing idea of
19 along the lines of, "Well, we're so busy." Well, yes,
20 we're busy, but it's our job to read the briefs and it's
21 our job -- it's in our job description to have arguments.
22 But one thing that may be factoring into this is how
23 different courts approach argument, and not just different
24 courts, but also the judges within the courts may have
25 different philosophies on arguments, and so there is a

1 wide variety of, you know, the results here as far as the
2 numbers go.

3 You know, for example, in Dallas and Fort
4 Worth, I bet a lot of lawyers in there, in Dallas/Fort
5 Worth area, are not even aware that there's an oral
6 argument problem because those courts have been pretty
7 steady across the board as far as having a high percentage
8 of arguments, much higher than throughout the rest of the
9 state, but through the remainder of the state there has
10 been this dramatic decline in the arguments. So you not
11 only have a difference of what's happening between the
12 courts but also within the courts, and let me tell you
13 what I mean by that.

14 For example, on our court under our internal
15 operating procedure, a case is assigned to a judge when
16 the notice of appeal is filed, and it's basically that
17 judge's responsibility to kind of carry the ball until the
18 case is submitted. Now, that judge may lose the
19 assignment of the case if that judge wants one disposition
20 and the other two judges want another disposition. Well,
21 then they will take over the majority and that judge will
22 lose the case. This is significant here because that
23 initial judge who is assigned to the case makes the
24 initial determination about whether to have argument or
25 not. And after that judge makes that initial

1 determination after talking with our staff lawyer, the
2 21-day notice letter will go out saying, well, argument
3 has been denied. The problem with that system is the
4 other two judges aren't really involved in the decision on
5 having an argument.

6 Now, under our rules and under the way this
7 works, is that each judge, each judge on a panel has an
8 equal vote and an equal say in how an opinion comes out,
9 but a practical problem arises when, you know, you have
10 this one judge making that initial determination. The
11 letter has gone out, and then we will meet, you know, for
12 the submission conference after the judge -- the other two
13 judges on the panel have the briefs, and one of those
14 judges may come in and say, "You know what, argument
15 really would have been helpful to me in this case." Now,
16 at that point in time the case is already set for
17 submission, it's on the docket, and the court's ready to
18 discuss the case. The three judge panel is ready to
19 discuss the case.

20 There have been occasions on our court
21 where, you know, we do have that submission conference, a
22 judge makes that suggestion, you know, "Argument really
23 would have been helpful to me," and then usually what will
24 happen is the other two panel members will kind of defer
25 to that; but then you have to reset the case again and

1 notify the parties, "Guess what, we are going to have an
2 argument in your case," and so it really slows down the
3 process; but there's kind of a, you know, collegialty
4 problem here as well because that judge, the one judge who
5 wants to have an argument, may feel they're imposing upon
6 their other two colleagues that the argument may not be
7 helpful to them. So often what happens is, is someone
8 will say, "You know what, I wish we had had an argument,"
9 but then if the other two judges don't really buy into
10 that, then that judge will just kind of say, "Well, okay,
11 we'll go ahead and decide this case."

12 So that creates a practical problem because
13 under the Federal rule, which we looked at, each judge has
14 a say in not only having an argument, but if one judge
15 wants to have argument, if argument would help that judge,
16 there is going to be an argument in the case. So we
17 studied that rule; and we made an attempt here to adopt it
18 in regard to our rules, incorporating it; and I guess the
19 place to start discussion would be with the first
20 proposal, which to the extent there is any controversy
21 would be less controversial, which is the idea that I
22 think we all agreed on. Well, I think it was like thirty
23 something to one, but we pretty much all agreed on the
24 idea of including a statement within a brief telling the
25 court how argument would be helpful to the court without

1 taking that out of the page numbers allotted to the party.
2 So if you want to discuss that first and then go into the
3 next one.

4 So we proposed on page eight -- there are
5 two versions here at the bottom of page eight. I think
6 the subcommittee basically felt -- we talked about where
7 would we put such a statement, and I don't think there was
8 any objection to the idea that the statement ought to come
9 after the statement of the case, which would be a good
10 place to put it, but before the issues presented, so we
11 were talking about placing such a statement regarding oral
12 argument as a new subdivision (e). It just seems to make
13 sense there as far as the placement goes.

14 Now, there are two versions here. Actually,
15 at the last minute when we were discussing this Jody
16 pointed out some inconsistencies between the first
17 version, which is entitled "Request for Oral Argument,"
18 and the second version, which is entitled "Statement
19 Regarding Oral Argument." I agreed with Jody that he was
20 correct that there were some inconsistencies, and I think
21 the only reason the first version is in here is because we
22 didn't have time to communicate it to all the other
23 subcommittee members, but is that correct, Jody?

24 MR. HUGHES: Yes.

25 HONORABLE TERRY JENNINGS: So I think what

1 we should be studying is the second proposal. I don't
2 know that anybody really has any disagreement that the
3 second proposal is the better proposal, more consistent
4 with the initial language in Rule 38.1. So with that in
5 mind, unless anybody wants to discuss the first proposal,
6 just going into the second proposal, it would be entitled
7 "Statement Regarding Oral Argument. The brief may include
8 a statement explaining why oral argument should or should
9 not be permitted. The statement should address how the
10 court's decisional process would or would not be aided by
11 oral argument. Any such statement must not exceed one
12 page."

13 There is an alternative there as to how to
14 go -- you may remember, Stephen Tipps recommended last
15 time that that language maybe "should seldom exceed one
16 page," but I think the subcommittee generally agreed that
17 there ought to be at least a page limit on that, one page,
18 but that's open to discussion, and then we have in this
19 additional language which refers the parties back to Rule
20 39.7. "As required by Rule 39.7, any party requesting the
21 oral argument must note that request on the front cover of
22 his brief."

23 CHAIRMAN BABCOCK: Okay. Any comments about
24 this second subparagraph (e) of Rule 38.1? Yeah, Frank.

25 MR. GILSTRAP: I don't have any comments

1 about the language. I think in the earlier drafts we had
2 moved up the -- in the Federal courts, either the Fifth
3 Circuit rule or the Federal Rules of Appellate Procedure,
4 they put it right after the identities of parties and
5 counsel, and the idea is that you can flip it open and
6 find it quick. Now, you know, I'm not the one reading
7 this thing from the bench, so I think the judges might
8 want to talk about that, but it seems to me, you know, the
9 idea is that you look at this without reading the whole
10 brief, so you may want to have it earlier in the brief. I
11 just don't know.

12 CHAIRMAN BABCOCK: It does have to be on the
13 cover.

14 MR. GILSTRAP: Yeah, but I'm talking
15 about the -- it has to be on the cover, but the same
16 statement. In other words, the reasons why they think our
17 oral argument would or would not be helpful. Where is
18 that in the brief? Is it buried in the brief or is it the
19 first part of the brief or does it make any difference?

20 CHAIRMAN BABCOCK: Okay. Richard Munzinger.

21 MR. MUNZINGER: I don't do a lot of
22 appellate work, but I'm just curious what "decisional
23 process" means and why would you say that instead of just
24 saying "state how the the court would or would not be
25 aided by oral argument" as distinct from saying

1 "decisional process," which to me says -- "decisional
2 process" is how you get to the decision, and I'm not sure
3 what it means, just kind of threw me when I read it
4 because I'm not, by God's good grace, in this business too
5 often.

6 CHAIRMAN BABCOCK: Okay. Any other
7 comments? Yeah, Judge Christopher.

8 HONORABLE TRACY CHRISTOPHER: I just don't
9 understand why you would make people say why it's not
10 useful? Because the way you-all have it written here
11 somebody has to put it in every brief, right, either yes
12 or no?

13 HONORABLE TERRY JENNINGS: Well, they have
14 to state on the cover whether argument is requested.
15 Within the brief --

16 HONORABLE TRACY CHRISTOPHER: But suppose
17 they said on the cover --

18 HONORABLE TERRY JENNINGS: Within the brief
19 they may make a statement. They don't have to make a
20 statement.

21 HONORABLE TRACY CHRISTOPHER: Yeah, but when
22 you put in "should not be permitted," and I wanted to
23 waive oral argument, I would feel like I've got to say
24 something.

25 HONORABLE TERRY JENNINGS: Well, one party

1 may -- one party may want argument and the other party may
2 feel strongly that argument is not necessary here. It
3 would at least give the judges a chance to look at, okay,
4 well, this particular party is making a big deal out of
5 this one issue and then you turn to the other side's brief
6 and they say, "You know what, that's decided authority,
7 therefore you don't need an argument." The other side is
8 just trying to get an argument. Just more information.
9 So if one side wants it and the other side doesn't, at
10 least it gives you the chance to have -- the judge, in
11 front of them at least within one page, you know, a short
12 argument for it and a short argument against it if
13 somebody wants to be opposed to it. It's basically
14 tracking language from the Federal rule.

15 CHAIRMAN BABCOCK: Gene.

16 MR. STORIE: Yeah, in our practice we do
17 some administrative appeals that frankly don't need oral
18 argument, but we try to sort of conditionally ask for it.
19 In other words, we don't want to waive it either in case
20 the court grants argument. So would that be a permissible
21 practice under the rule?

22 CHAIRMAN BABCOCK: I think so.

23 MR. STORIE: I think so.

24 CHAIRMAN BABCOCK: Yeah, I would think so.

25 Yeah, Justice Gray.

1 Masquerading as Honorable Kent Sullivan.

2 Yeah, I wouldn't want to be him either.

3 HONORABLE TOM GRAY: Given the lead-in
4 sentence to Rule 38.1 that the items should be in the
5 order here indicated, we need to move the requirement for
6 the request to item (a), because it is on -- a requirement
7 to have it on the cover, and I lost my argument of why we
8 didn't need to change the rule and expand it, and I won't
9 redo that, but it will not matter to me as an appellate
10 judge whether it comes after the statement of the case or
11 right after the identity of the parties. There's some
12 logic for either place, but I do think that item (a) in
13 here needs to be request for oral argument.

14 HONORABLE TERRY JENNINGS: Well, as Jody
15 pointed out to the subcommittee, there's a difference
16 between the request for oral argument, which must be on
17 the cover of the brief, if you want an argument you must
18 put that on the cover of the brief, and as Jody pointed
19 out, the statement regarding oral argument, which may be
20 made but doesn't have to be made, is a different matter
21 entirely.

22 HONORABLE SARAH DUNCAN: Well, then why is
23 it in the same subsection?

24 HONORABLE TERRY JENNINGS: I'm sorry?

25 HONORABLE SARAH DUNCAN: Then why is it in

1 the same -- why isn't there an (e), request for oral
2 argument that must be stated on the cover of the brief,
3 and an (f), a statement regarding oral argument which may
4 or may not be included in the brief.

5 HONORABLE TERRY JENNINGS: The request for
6 oral argument is covered by Rule 39.7, which states that,
7 you know, it talks about waiver of argument and requesting
8 argument, 39.7, and 39.7 says the request must be on the
9 cover of the brief.

10 HONORABLE SARAH DUNCAN: But that's not true
11 under this proposal. This proposal, the first sentence of
12 the first alternative (e) is "The brief must state on its
13 front cover whether oral argument is requested or waived."

14 HONORABLE TERRY JENNINGS: I think we've
15 universally rejected because Jody pointed out that (e) did
16 have those inconsistencies. That's why we're talking
17 about the second proposal.

18 HONORABLE SARAH DUNCAN: Well, I haven't
19 rejected it.

20 HONORABLE TERRY JENNINGS: Okay.

21 HONORABLE SARAH DUNCAN: I thought what we
22 were trying to do is conform the rule to get everything in
23 38 that has to be in the brief, and if people have to have
24 oral argument requested on the front cover of the brief,
25 that, in my view, ought to be in 38, which is entitled

1 "Requisites of Briefs." If we also want to say, "You may
2 include in your brief a statement regarding oral
3 argument," that's fine, but it's something different.

4 CHAIRMAN BABCOCK: Well, Sarah, it is here
5 in Rule 38 in the second version that we're looking at
6 because it says, "As required by Rule 39.7, any party
7 requesting oral argument must note that request on the
8 front cover of its brief."

9 HONORABLE SARAH DUNCAN: That's right, but
10 they were differentiating between the request --

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE SARAH DUNCAN: -- which must be
13 noted on the front cover --

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE SARAH DUNCAN: -- and the
16 statement, which is a statement for reasons for permitting
17 or not permitting oral argument, and my point is it's two
18 different things, let's treat it as two different things.
19 One is required. That's the request. One is permitted.
20 That's the statement. So it seems to me we ought to
21 separate them, and both of them should be in Rule 38.

22 CHAIRMAN BABCOCK: I understand. Yeah.
23 Nina.

24 MS. CORTELL: I think that there is some
25 tension here because we're adopting something from the

1 Federal rules pretty much the same regarding oral
2 argument, but I don't think in the Federal court we have
3 the same point that you've got to put the request on the
4 cover. So in particular going to the conditional, you
5 know, where you really think there ought not be argument
6 in this case but you certainly don't want the circumstance
7 of the other side getting argument and you're not. The
8 tension then comes up when I'm writing a statement, but
9 now I've got to put also something on the cover, which I
10 don't have to do in Federal court, so is it conditional
11 request for oral argument on the cover or what are we
12 thinking?

13 HONORABLE TERRY JENNINGS: I mean, we could
14 delete the requirement that the request be on the cover.

15 HONORABLE SARAH DUNCAN: No.

16 HONORABLE TERRY JENNINGS: I don't like that
17 idea because one of the first things that the staff
18 attorney or whoever is screening this case is going to
19 have to do is see whether argument's been requested or
20 not. The easiest thing to do is look at the front cover
21 and if a party has requested argument they can put it on
22 one stack as opposed to if argument has been waived by
23 both parties in another stack. I mean, we don't have to
24 have that requirement, but I think it's -- I think it
25 helps the intermediate appellate court --

1 MS. CORTELL: Right.

2 HONORABLE TERRY JENNINGS: -- as far as, you
3 know, where does this case fit into the system.

4 MS. CORTELL: If we do that -- and I don't
5 have a problem putting it on the cover -- what would be
6 the recommended practice for the advocate who thinks they
7 don't need argument, but doesn't want to be stuck having
8 waived it? Should they put on the cover "conditional
9 request"?

10 HONORABLE TERRY JENNINGS: Well, I think
11 usually that's what happens, is somebody will put oral
12 argument -- if I remember correctly, just, you know,
13 glancing at a lot of these briefs over the years, people
14 will often put "Oral argument waived unless requested by,"
15 you know, "the opponent." But that's kind of been my
16 experience.

17 MR. LOW: Terry, what happens if one party
18 puts on there, you know, oral -- or they don't request
19 oral argument. The other one doesn't put it on the cover,
20 but he puts good reasons in there why and the court says,
21 "Well, wait a minute, there should be oral argument," and
22 the other side says, "No, he waived it because he didn't
23 put it on the cover."

24 HONORABLE TERRY JENNINGS: Well, I don't
25 think that's a problem. I think if they request --

1 MR. LOW: I'm not saying -- what would
2 happen theoretically?

3 HONORABLE TERRY JENNINGS: I think for all
4 practical purposes -- and Jody pointed this out. I think
5 there may be some inconsistency here about where you place
6 this because I would think that if it's requested
7 anywhere --

8 MR. LOW: Okay.

9 HONORABLE TERRY JENNINGS: -- it's
10 requested. It's not waived.

11 MR. LOW: Right.

12 HONORABLE TERRY JENNINGS: The idea of
13 putting it on the cover is really for the benefit of the
14 court as far as processing the paper work. So --

15 CHAIRMAN BABCOCK: Ralph.

16 MR. DUGGINS: Well, given the lead-in
17 sentence in 38.1, it seems to me that it's inconsistent to
18 have an optional statement in that 38.1. I think if
19 you're going to use -- add this statement regarding oral
20 argument, why not put it under 39.7?

21 HONORABLE TERRY JENNINGS: I think the
22 committee at the last -- go ahead, Jody.

23 MR. HUGHES: I was just going to say we
24 talked about this. The problem is that language in the
25 beginning of the 38. It's sort of the part that organizes

1 the structure of the brief; and for better or for worse,
2 it uses the "must" language; but it's what people look to
3 when they're putting the brief together for the order of
4 where things go; and I think the problem is, yes, if you
5 want to put something in as a permissive rather than
6 mandatory, it makes sense in one way to get it out of
7 38.1; but then you're also getting out of the structure
8 that's imposed by 38.1; and I think we also talked about
9 this -- as a practical matter people look to Rule 38 to
10 see what should or must go in the brief and don't tend to
11 look at 39 as much.

12 Maybe they should, and particularly they
13 should to know that they waive the right to oral argument
14 by not putting it on the cover, but that was also why we
15 wanted to put this reminder in here about putting the
16 request on, recognizing that people tend to look to Rule
17 38 to see what should go in the brief, and we didn't think
18 that the slight inconsistency about "must" and "may" --
19 that's kind of cleaned up by the fact that it clearly --
20 you know, it does say "may," and we recognize that there
21 is some inconsistency there, but it's just driven by the
22 way the structure is laid out.

23 CHAIRMAN BABCOCK: Ralph, did you -- is
24 it --

25 MR. DUGGINS: Well, I just think that the

1 first sentence says, "The brief must contain the
2 following," and then you've got something that it really
3 doesn't, that's an option that --

4 CHAIRMAN BABCOCK: Yeah, "must," "may," and
5 "should." Justice Gaultney, then Sarah.

6 HONORABLE TERRY JENNINGS: We can maybe fix
7 that with, "If requested by a party," you know, "the brief
8 may include the statement" or something like that. We
9 can -- we could qualify it.

10 CHAIRMAN BABCOCK: You could also say if you
11 wanted to really get complicated, "The appellant's brief
12 must," comma, "except as under subsection (e)," comma.

13 HONORABLE TERRY JENNINGS: Right.

14 CHAIRMAN BABCOCK: You could do it that way.
15 Justice Gaultney.

16 HONORABLE DAVID GAULTNEY: I think there is
17 a simple way to do it, and I think the problem is, is
18 there is a "must" requirement here, and so someone reading
19 it is going to say, "Well, why are you making me say
20 why" -- so the problem is we've got an optional
21 requirement within a "must" deal. Hear me out, hear me
22 out.

23 The -- here is the problem. I don't think
24 it's going to be a situation where somebody puts a request
25 for oral argument and the court is going to say they

1 waived this inside. I think here is the more likely
2 problem: The clerk getting it looks on the front page of
3 the brief and it doesn't say "Request for oral argument."
4 Let's say it's overlooked, the person intended to put it
5 on the front page of the brief and it wasn't, but there's
6 a statement of it in. Well, that brief might be
7 considered waiver by the clerk that's accepting it for
8 filing.

9 So because of that problem and also because
10 you want to have the attorney reading the brief
11 requirements understanding that these are two separate
12 things, one, you must have it on the front page of the
13 brief and then, secondly, an optional requirement, you
14 may. I was going to suggest that Sarah had a good idea to
15 separate them out; that is, to put the "must" as an item,
16 a separate item, and then after the statement regarding
17 oral argument simply put in parentheses "optional" or
18 something like that, so that you have clearly a mandatory
19 deal and you have clearly something that's described as
20 optional next, but have them separate.

21 CHAIRMAN BABCOCK: Yeah. Sarah.

22 HONORABLE SARAH DUNCAN: Well, the truth is,
23 it's said "must" for how many years? 20 something years?
24 And not every brief conforms to this or necessarily should
25 conform to this. What is the -- I have several points.

1 One, what is the problem with requiring a statement
2 regarding oral argument in every case, and, two, I thought
3 it was in the Fourth Court of Appeals local rules, but
4 apparently it's in the internal operating procedures for
5 the handling of cases, but our -- their IOPs set out what
6 happened if somebody requests and somebody else doesn't
7 think oral argument is needed and oral argument is
8 granted, that the court's IOPs say the other party
9 necessarily gets an opportunity to argue.

10 I don't understand really why this has
11 gotten so complicated. I mean, where this started was
12 just let's have a section of Rule 38 that says if you want
13 to include a statement regarding oral argument you can,
14 because some people felt like if it wasn't in 38 they
15 couldn't do it. I never thought that was a correct view,
16 but that was some people's view.

17 HONORABLE TERRY JENNINGS: Well, and I
18 understood that to be our charge, was to craft a rule
19 regarding a statement regarding oral argument for Rule 38
20 because people felt that since it's going to be in the
21 brief it should be in the briefing rule as opposed to the
22 oral argument rule. The issue of 39.7, which states, "A
23 party desiring oral argument must note that request on the
24 front cover of the party's brief," well, that's a separate
25 issue entirely. You know, if the committee wants to study

1 that issue and the idea of taking it off the table, that's
2 a separate issue, but what we were trying to do is include
3 this statement in the briefing portion so that a party
4 would know where to put such a statement, and it should be
5 in the brief, and they shouldn't have to like file a
6 separate statement or something outside of the brief and
7 all that.

8 There should be a statement in the brief,
9 and -- but we didn't want to mislead people, and so we
10 included that sentence about, well, we want to refer them
11 back to 39.7 so that when they read this rule, when they
12 make their statement, they're also reminded that they have
13 to put the request on the cover. So, I mean, we were just
14 really trying to address the simple proposition of, okay,
15 if you want to you can tell the court how argument would
16 help the court. By the way, you need to remember that if
17 you make such a request, put it on your front cover, see
18 39.7.

19 HONORABLE SARAH DUNCAN: My one substantive
20 comment is the "must not exceed one page," I think that's
21 a simplistic way of looking at the cases in the courts.
22 Some cases it's just going to take more than a page to
23 explain why you need oral argument. It just is.

24 CHAIRMAN BABCOCK: Frank, did you -- you
25 look like you're waiting to say something.

1 MR. GILSTRAP: Well, let me respond to that.
2 The problem is, is the statement regarding oral argument
3 is argumentative; and if you say it should seldom exceed a
4 page, well, this is my case and it's one of those cases
5 where it should exceed a page and I want to do five pages.
6 I mean, there's no limit, and aggressive litigants are
7 going to stretch it out till they -- you know, and that
8 was the reason we had a hard and fast limit, because it's
9 argument and you're telling the court not only why it
10 wants to hear your case, but why it should rule for you.

11 CHAIRMAN BABCOCK: Yeah, good point.
12 Anybody else have comments? Jody.

13 MR. HUGHES: Just one thought on that, is I
14 guess if you wanted to give people the option to do it,
15 you could have it count toward your page limits and then
16 if they wanted to spend their dime on it, so to speak,
17 have at it, and it wouldn't, you know -- if that's where
18 they thought their briefing pages were best spent then --
19 but we drafted it so that it doesn't count, as Frank said.

20 CHAIRMAN BABCOCK: Gotcha. Any other
21 comments? Sarah, where do you want to go? You know, it
22 looks to me like both versions have support in the
23 comments from everybody. Or Justice Jennings. I mean,
24 whichever of you.

25 HONORABLE SARAH DUNCAN: I was going to

1 say --

2 HONORABLE TERRY JENNINGS: Well, I think the
3 second version, which Jody drafted to make consistent with
4 Rule 38.1 as best we could, I think that's the better
5 version.

6 MR. GILSTRAP: The first one's off the table
7 I think.

8 HONORABLE TERRY JENNINGS: Right.

9 CHAIRMAN BABCOCK: The first one's off the
10 table. Okay.

11 MR. AGOSTO: And I'd like to add Justice
12 Gaultney's "optional" in parentheses or something to that
13 effect, not that I practice appellate work, but it would
14 make it clear that this is the order where you want it if
15 you're going to include it, but it's optional, and the
16 last sentence clarifies the rule as far as where you want
17 it on the cover for purposes of the clerk.

18 CHAIRMAN BABCOCK: Judge Christopher. And
19 then Sarah.

20 HONORABLE TRACY CHRISTOPHER: How about like
21 (a) be "cover of the brief," and, you know, this is where
22 you put oral argument rather than hiding it down in (e) or
23 putting it in 39? Just, you know, that seems the most
24 logical way to present it in my mind, while we're changing
25 it.

1 HONORABLE SARAH DUNCAN: But, gee, Tracy, we
2 don't have a subsection entitled "Cover of the Brief."

3 HONORABLE TRACY CHRISTOPHER: I'm asking you
4 to put one on.

5 HONORABLE SARAH DUNCAN: We can't possibly
6 put it there.

7 CHAIRMAN BABCOCK: Nina, did you have your
8 hand up?

9 MS. CORTELL: I'm just in favor of it being
10 mandatory. I think it's a good idea, it's helpful to the
11 court, so I would resolve the discrepancy between "must"
12 and "may" that it just should be "must."

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE SARAH DUNCAN: I second that.

15 CHAIRMAN BABCOCK: Any other comments?

16 HONORABLE TERRY JENNINGS: Well, unless
17 waived. "Unless argument is waived, the brief must
18 include"?

19 MS. CORTELL: Well, it's a statement
20 regarding argument, so either way.

21 CHAIRMAN BABCOCK: Frank.

22 MR. GILSTRAP: I think the problem we've got
23 here is that in state court I believe the approach is,
24 well, these guys waived argument, we're not going to hear
25 it. In Federal court it's not your call. You know, they

1 -- well, we may want to hear oral argument in this case,
2 so it's kind of a fundamental distinction of the way the
3 courts approach it. You know, again, maybe the appellate
4 judges could tell us. But if, in fact, the real world is
5 that here's appellant's, appellee's brief, they both
6 waived it, we're not going to hear it, then I think we
7 ought to stay with the current approach.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE TERRY JENNINGS: Now, just for
10 clarification, under 39.7, even if the parties have waived
11 argument the court can still order it here. I have only
12 done that in one case in the over six years I have been on
13 the court. I have only seen one case where I've done
14 that, but, I mean, the --

15 CHAIRMAN BABCOCK: Proves it can happen.

16 HONORABLE TERRY JENNINGS: -- Federal they
17 do it a lot more often than we do.

18 CHAIRMAN BABCOCK: Sarah, any final
19 comments?

20 HONORABLE SARAH DUNCAN: No.

21 CHAIRMAN BABCOCK: No final comments. So
22 the question is whether or not we're in favor of this rule
23 as drafted at the bottom of page eight and the top of page
24 nine with respect to Rule 38.1, subsection (c). So
25 everybody in favor of it as drafted raise your hand. You

1 got your hand up?

2 MR. LOPEZ: No, no, no.

3 CHAIRMAN BABCOCK: Everybody opposed?

4 MR. DUGGINS: Is that --

5 HONORABLE TRACY CHRISTOPHER: Can we have a
6 separate vote on "decisional process"?

7 CHAIRMAN BABCOCK: It's 12 to 8 in favor.

8 HONORABLE TRACY CHRISTOPHER: Please.

9 CHAIRMAN BABCOCK: Tracy, what did you say?
10 I'm sorry.

11 HONORABLE TRACY CHRISTOPHER: I said can we
12 have a separate vote on the words "decisional process"
13 because I also find that --

14 HONORABLE TERRY JENNINGS: Well, some of
15 this refers to the -- some of this is going to refer to
16 the next proposed rule regarding under what circumstances
17 can the court deny argument. The reason -- and this is my
18 fault. The reason this sentence is in is because I
19 requested it. The statement should address how the
20 court's decisional process would or would not be aided by
21 oral argument. The point there was, was to -- not only
22 should a party make such a statement, but to give them
23 guidance on what they really should be addressing in this
24 short statement.

25 Yes, people are going to use the statement

1 argumentatively, you know, not just to give argument, but
2 also to get their point across in regard to why they think
3 they should prevail, but this is what the litigant really
4 should be focusing on, how is oral argument going to help
5 the court make up its mind about your case.

6 CHAIRMAN BABCOCK: Ralph.

7 MR. DUGGINS: Can we have a straw vote on
8 that same language except change the word "may" to "must"?

9 CHAIRMAN BABCOCK: Well, I think that -- I
10 bet you that's why a lot of people voted against it, and
11 the Court's got the benefit of our discussion, if they
12 think "must" ought to be the word. Carl.

13 MR. HAMILTON: I think you said it was 12 to
14 8 in favor.

15 CHAIRMAN BABCOCK: I did.

16 MR. HAMILTON: In favor of the wording?

17 CHAIRMAN BABCOCK: Yes.

18 MR. HAMILTON: I thought it was the other
19 way around.

20 CHAIRMAN BABCOCK: No. The first vote was
21 -- people were voting in favor the first time and against
22 the second time, and 12 people voted the first time and 8
23 the second time.

24 MR. GILSTRAP: The Chair not voting.

25 CHAIRMAN BABCOCK: Huh?

1 MR. GILSTRAP: The Chair not voting.

2 CHAIRMAN BABCOCK: Chair not voting, sorry.

3 Harvey.

4 HONORABLE HARVEY BROWN: Well, I think the
5 phrase "decisional process" is also awkward, but in
6 talking to Justice Jennings earlier I understand why he
7 wants it. If you turn to page 10 you'll see that the
8 (b)(4) uses the exact same phrase, and he was explaining
9 to me that this is designed to give the court a little
10 more discretion, and so if you have it in 39.1(b)(4) then
11 at least you understand the context for why the court
12 wants it in 38.1.

13 CHAIRMAN BABCOCK: And for what it's worth,
14 "decisional process" is used in the Federal rule.

15 HONORABLE HARVEY BROWN: Okay.

16 HONORABLE TERRY JENNINGS: Right. We stole
17 it straight from them.

18 MR. LOW: It is a process. Every time you
19 read the brief, the argument is a process. You don't just
20 make your mind up. There's processes.

21 CHAIRMAN BABCOCK: Yeah. You're walking
22 down a long road.

23 MR. LOW: That's right.

24 CHAIRMAN BABCOCK: Okay. Which brings us to
25 39.1.

1 HONORABLE JAN PATTERSON: Chip, is there --

2 CHAIRMAN BABCOCK: Yes, I'm sorry, Judge.

3 HONORABLE JAN PATTERSON: Is there an
4 appetite or have we decided the order of these or was that
5 included within the vote? Whether it should be (e) or (a)
6 or (b)?

7 CHAIRMAN BABCOCK: We didn't decide that
8 because I didn't think that was on the table, but we can
9 talk about it if you want.

10 HONORABLE JAN PATTERSON: Well, a couple of
11 people mentioned it. It is a -- if you're flipping open
12 the brief --

13 CHAIRMAN BABCOCK: Yeah, that wasn't the
14 vote. That was not the vote, to vote on whether it should
15 be (e) or (a). Sarah.

16 HONORABLE SARAH DUNCAN: Well, then I'll
17 just make a -- can I just try to shortcut this?

18 CHAIRMAN BABCOCK: Yes.

19 HONORABLE SARAH DUNCAN: I'll just second
20 Judge Christopher's motion, if she would incorporate it in
21 that formal vehicle, that there be -- that (a) be entitled
22 "Cover of the Brief" and that the --

23 HONORABLE TRACY CHRISTOPHER: I think only
24 Chip makes motions, but to the extent that we need one,
25 I'm for that. I'll make a motion for an (a), cover.

1 HONORABLE SARAH DUNCAN: And the last
2 sentence of what we just voted on be put in that (a),
3 "Cover of the Brief," since logically the cover of the
4 brief is the first thing these people who are writing a
5 brief need to be worried about.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE SARAH DUNCAN: And you want me to
8 make this a two-part motion, or do you think that's too
9 controversial?

10 CHAIRMAN BABCOCK: It might be too hard for
11 the Chair to follow, but give it a shot.

12 HONORABLE SARAH DUNCAN: And then as we are
13 renumbering we will have (a); (b) will be "Identity of
14 Parties and Counsel"; (c), Table of Contents.

15 HONORABLE TERRY JENNINGS: Well --

16 HONORABLE SARAH DUNCAN: It was too
17 controversial. I withdraw that.

18 HONORABLE TERRY JENNINGS: My concern is, is
19 there a rule dealing with what must be on the cover of the
20 brief, because obviously the style and all that's going to
21 be on the cover of the brief? If we say "Cover of the
22 Brief" and that's all that is required to be on the cover
23 of the brief is whether or not oral argument is
24 requested --

25 HONORABLE TRACY CHRISTOPHER: Well, I asked

1 Jane, how do I know what to put on the cover, and she
2 said, "You just do," you know.

3 HONORABLE SARAH DUNCAN: I think it would be
4 a good idea to tell people what should be on the cover.

5 HONORABLE TERRY JENNINGS: Style of the
6 case, cause number.

7 HONORABLE SARAH DUNCAN: Well, from writing
8 opinions, I would like the trial court case number, but
9 that may be too controversial.

10 CHAIRMAN BABCOCK: Yeah, you were the one
11 that predicted this whole appellate thing was going to
12 take 20 minutes.

13 HONORABLE SARAH DUNCAN: Right. Forget it.
14 I have no suggestions.

15 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

16 HONORABLE DAVID GAULTNEY: There is a Rule
17 9.4(g) which goes over the --

18 THE REPORTER: I'm sorry, speak up, please.

19 MR. GILSTRAP: What was that again?

20 HONORABLE DAVID GAULTNEY: 9.4(g).

21 HONORABLE BOB PEMBERTON: That's how we know
22 we can't use red paper on the cover.

23 HONORABLE SARAH DUNCAN: No, that's Federal
24 court.

25 HONORABLE BOB PEMBERTON: I think we have

1 that, too. There is a paper color rule in there
2 somewhere, I could have sworn.

3 MR. HUGHES: Yeah, (f) is the --

4 HONORABLE TERRY JENNINGS: Also, it's
5 interesting to note that in (g) it does say, "If a party
6 requests oral argument in the court of appeals, the
7 request must appear on the front cover of that party's
8 brief." So it's already in -- the problem is, is 38 deals
9 with the contents of the brief, whereas 9 deals with the
10 contents -- literally, quote-unquote, contents of the
11 cover.

12 CHAIRMAN BABCOCK: Yeah. So we've got it
13 covered nine different ways. Justice Gaultney.

14 HONORABLE DAVID GAULTNEY: I still think
15 Sarah's point is well. It's just what you could entitle
16 it, "Request for Oral Argument," but right at the front
17 because that's where you start, you start with the cover.
18 Put it right at the beginning, request must be on the
19 front page, front cover of the brief, period, see
20 whatever.

21 HONORABLE SARAH DUNCAN: In addition to
22 what's -- in addition to the requirements of 9.4(g), take
23 the last sentence of 9.4(g) and put it over there, "if a
24 party requests."

25 HONORABLE DAVID GAULTNEY: Just instead of

1 entitling it "Cover," just entitle it "Request" and then
2 when you come down to wherever you want to put the
3 statement where your -- your optional statement, then it
4 could be a separate --

5 HONORABLE TERRY JENNINGS: Right.

6 HONORABLE DAVID GAULTNEY: Separate deal.

7 CHAIRMAN BABCOCK: Justice Jennings.

8 HONORABLE TERRY JENNINGS: Well, I wanted to
9 go back to the "must" versus "may" include a statement.
10 There are a number of cases where you wouldn't want to put
11 a party through the trouble of making a statement for oral
12 argument. One would be an Anders case obviously, a
13 criminal case that the lawyer has concluded this is a
14 frivolous appeal. Do we really want to require that
15 lawyer to include in their Anders brief a statement why
16 oral argument is not requested, I mean, to take up more
17 space? Well, it's not requested because it's a frivolous
18 appeal, but --

19 CHAIRMAN BABCOCK: Let me just tell you one
20 more time.

21 HONORABLE SARAH DUNCAN: What's wrong with a
22 one-sentence statement, "Oral argument is not required in
23 this Anders case"? What's wrong with requiring that if
24 the benefit is we get a statement regarding oral argument
25 in the other 99 cases?

1 HONORABLE TERRY JENNINGS: Well, then you
2 have a general rule where you're listing, well, except in
3 these circumstances.

4 CHAIRMAN BABCOCK: Justice Gaultney.

5 HONORABLE DAVID GAULTNEY: I don't think
6 it's only Anders cases. I mean, I think there -- I don't
7 think we should -- if an attorney feels like, for whatever
8 reason, that he or she doesn't want to request oral
9 argument, I'm not sure we should require the attorney to
10 argue why oral argument is not -- will not aid the
11 decisional process. I think that ought to be optional.
12 You could use it if you want. If you want to argue that
13 it's not helpful, you have that opportunity, but I think
14 there's an advantage to the advocate for having it as an
15 optional requirement.

16 CHAIRMAN BABCOCK: Yeah. Yeah, we just
17 voted to make it optional. The Court's got the benefit of
18 our discussion if the Court thinks it ought to be
19 otherwise.

20 Let's go to 39.1, Justice Jennings.

21 HONORABLE TERRY JENNINGS: The current rule
22 reads "Right to Oral Argument," and I wasn't on the
23 committee obviously in '97 when the rule was changed, but
24 my understanding was, is if you requested oral argument
25 you got an oral argument. You literally had a right to

1 oral argument if you properly requested it, and then, of
2 course, the rule changed in 1997; and I'm guessing that
3 was due to the high volume of cases and so forth and
4 appellate courts just couldn't hear -- well, you lay out
5 the history.

6 HONORABLE SARAH DUNCAN: My understanding --
7 my understanding is that what happened in '97, the rule in
8 civil cases had always been that the court had the
9 discretion to deny oral argument.

10 HONORABLE TERRY JENNINGS: Only in criminal?

11 HONORABLE SARAH DUNCAN: When I got to the
12 court there was no discretion to deny oral argument in a
13 criminal case, and in '97 it was made discretionary with
14 the court to have oral argument in a criminal case.

15 HONORABLE TERRY JENNINGS: But,
16 nevertheless, you look at the phrase "Right to Oral
17 Argument," but obviously it's a very limited right. Under
18 the old rule, except as provided in 39.8 -- or the current
19 rule, I should say, "any party who has filed a brief and
20 has timely requested oral argument may argue the case to
21 the court," with the exceptions listed in 39.8, which was
22 obviously segregated out. And then 39.8 under it
23 basically says, "In its discretion the court of appeals
24 may decide a case without oral argument if oral argument
25 would not significantly aid the court in determining the

1 legal and factual issues presented in the appeal."

2 There are a number of concerns with the old
3 rule that I had and discussed with the subcommittee. One
4 is the simple fact that if you look at this rule and you
5 compare it to the Federal rule, which basically we've
6 incorporated under standards with some changes right below
7 on page 10. We have the proposed 39.1. If you look at
8 39.8, you know, "argument would not significantly aid the
9 court in determining the legal and factual issues
10 presented in the appeal," how that works out on a court,
11 as I mentioned before, is usually -- and I'm talking about
12 my court, and I know the 14th Court of Appeals does this,
13 and I think some of the other appellate courts do this
14 kind of routinely. No matter when a case is assigned it's
15 usually a single judge that makes that initial
16 determination to have argument or not.

17 Now, the way the rule reads now, well,
18 that's subject to different interpretations. What I might
19 find would significantly aid me in understanding the facts
20 or a law might be quite different than what Judge Gaultney
21 would feel in a case. We could have a good faith
22 disagreement about whether or not argument in this
23 particular case would significantly aid us individually.
24 The problem with the rule and how it's used in the courts
25 -- and I'm saying how it's used, when deference is given

1 to that initial judge, well, there are some judges who
2 feel, quite frankly, that, well, if I don't have to do
3 something, I'm not going to do it. There are other judges
4 who feel quite legitimately that, you know what, if it's
5 covered in the brief, I don't need an argument. There are
6 other judges who are going to be more generous with
7 argument.

8 The problem with deferring to one judge is
9 basically that judge is making a decision to deny argument
10 in a case that might be helpful to one of their
11 colleagues, and if you believe that each judge on a panel,
12 each judge on a three-judge panel, has an equal say in the
13 outcome of that case and they have a right to, you know,
14 write their own separate opinion if they need to, that's a
15 problem.

16 And if you look at the statistics, you know,
17 there is a significant variation, as I said, between
18 Dallas and Fort Worth, which are very generous with
19 arguments, and our court and the Corpus Christi court, who
20 at least through 2005 we were not as generous with our
21 arguments, but I bet if you look within each court -- and
22 I don't have stats because I don't think they're kept, but
23 I bet if you look within each court there is going to be a
24 significant difference between the judges individually who
25 grants argument and who doesn't.

1 So one reason -- and just starting out the
2 conversation here, one reason in looking at the Federal
3 rule, I think the Federal rule articulates the way it
4 should be and the way theoretically it is, which is that
5 if argument is going to help one judge, one judge, the
6 collegiality -- the deference should go to that judge that
7 argument is going to help as opposed to that judge
8 deferring to the other judge who doesn't want to hear an
9 argument. You know, if argument is going to help one
10 judge, that judge ought to have an argument; and that's
11 the way the Federal rule is constructed, because if you
12 look at the Federal rule it basically says "if requested
13 by any party"; and this is not directly from the Federal
14 rule, but this language is, "oral argument must be allowed
15 in the case unless a panel of three judges who examined
16 the briefs unanimously agrees that oral argument is
17 unnecessary."

18 So under the Federal rule, which we're
19 proposing adopting some of that language, if one judge on
20 the panel wants to have an argument after they've examined
21 the briefs and looked at the statements and so forth, that
22 judge will get an argument.

23 CHAIRMAN BABCOCK: Okay. Justice Pemberton.

24 HONORABLE BOB PEMBERTON: Question for Judge
25 Jennings. Would those goals be significantly compromised

1 by changing that unanimity requirement to a majority of
2 the panel?

3 HONORABLE TERRY JENNINGS: I think so,
4 because --

5 HONORABLE BOB PEMBERTON: Because, you know,
6 that's just personalities of individual appellate courts
7 and two judges getting mad at each other and what happens,
8 is one trying to slow up the other's work, that sort of
9 thing.

10 HONORABLE TERRY JENNINGS: Well, hopefully
11 we're not using argument or anything else to slow up our
12 colleague's work.

13 HONORABLE BOB PEMBERTON: Yeah.

14 HONORABLE TERRY JENNINGS: And I would hate
15 to draft a rule along those lines, but if one judge, if
16 argument would significantly aid a judge in the decisional
17 process, if it would help them understand the law or the
18 facts, that judge ought to have an argument.

19 One of the criticisms is not just the sheer
20 drop in numbers of the arguments that have occurred
21 throughout the state, just the sheer drop, but in the kind
22 of cases that are not being argued. There are -- I have
23 heard criticisms from the bar that there are significant
24 cases, you know, termination of parental rights cases that
25 aren't being argued, significant criminal cases that

1 aren't being argued. The criminal bar is really upset,
2 because as bad as the stats are for civil arguments, they
3 are really very, very low for criminal cases, getting
4 arguments in criminal cases.

5 Also, you have significant no evidence
6 points which are basically being decided without argument
7 when that area of the law is at least in development right
8 now about what is no evidence, what is not no evidence,
9 after City of Keller and things like that. There are
10 significant decisions being made where, you know, jury
11 verdicts are being either taken away or whatever. A lot
12 of things happening without argument where litigants are
13 feeling like they don't have --

14 CHAIRMAN BABCOCK: Pemberton just cried
15 "uncle."

16 HONORABLE BOB PEMBERTON: No, I didn't.

17 HONORABLE TERRY JENNINGS: But, again, you
18 either believe that each judge has an equal vote and an
19 equal say, and if that's the case and argument would help
20 one judge then I think the Federal rule is --

21 CHAIRMAN BABCOCK: Buddy. And then Judge
22 Pemberton can say he doesn't cry "uncle."

23 MR. LOW: You have an (a) and a (b). What
24 is covered in (a) that's not covered in (b)?

25 HONORABLE TERRY JENNINGS: Right. What's

1 covered in (a) is generally some language from the rule as
2 it exists now. The problem was or part of the problem
3 was, is that 39.1 and 39.8 are separated, although they
4 are related; and so this is an attempt to combine those
5 two together and say, look, if you requested it, you may
6 argue the case subject to paragraph (b). Now, we don't
7 have -- we don't have to have an (a) or (b).

8 MR. LOW: (b) says "if requested." Up there
9 it says "timely filed a brief." It says, "If requested by
10 any party, oral argument must be allowed." You state that
11 "unless" and that covers your point.

12 HONORABLE STEPHEN YELENOSKY: Well, (a) is
13 either redundant or it says something very strange, which
14 is you can have oral argument, but the only people who get
15 to argue are the ones who request it.

16 HONORABLE TERRY JENNINGS: Right. Well, I
17 -- this is procedurally how it went through the
18 subcommittee. I didn't think we needed "if requested by
19 any party" under subdivision (b) because I thought (a)
20 stated the rule generally and then (b) stated basically
21 the standards for denying arguments, but some people felt
22 that "if requested by any party" should be there.

23 MR. LOW: But (b) says all of that.

24 HONORABLE STEPHEN YELENOSKY: We're saying
25 get rid of (a).

1 CHAIRMAN BABCOCK: Yeah. Buddy is saying
2 get rid of (a) and have (b) stand alone.

3 HONORABLE TERRY JENNINGS: We can combine
4 the two sentences and make them consistent.

5 CHAIRMAN BABCOCK: Justice Pemberton.

6 HONORABLE BOB PEMBERTON: I was just going
7 to say I think the idea of having some better fleshing out
8 of objective standards of when oral argument should not be
9 -- now, I agree the default ought to be to grant argument
10 -- should not be granted or is helpful because, as Judge
11 Jennings noted, judges are all over the place on this, and
12 the problem is not in and of itself that not enough
13 argument is being granted. That's a simpler thing. It's
14 that, you know, the judge -- cases that really ought to be
15 argued are not getting argued, and I think having these
16 parameters and at least for judges' internal discussion,
17 whether it's a majority of a panel or unanimity or
18 whatever, will be very helpful.

19 HONORABLE TERRY JENNINGS: Right. Well, the
20 reason they are listed out is at least in my mind it
21 provides context. Here are circumstances that are
22 legitimate reasons for a panel not to have argument, and
23 again, there could be a good faith disagreement --

24 HONORABLE BOB PEMBERTON: Yeah.

25 HONORABLE TERRY JENNINGS: -- between judges

1 about, you know, whether or not this case would help them.
2 But at least if you try to have some kind of a list, you
3 know, obviously if the appeal is frivolous, you don't need
4 an argument if the appeal is frivolous. You don't need an
5 argument if the law has already been decided on a
6 pertinent issue under these particular facts. Number
7 three is kind of a tip of the hat, if you will, to the
8 judges who feel, well, basically, if it's adequately
9 covered in the briefing and so forth, we don't need an
10 argument, at least gives the judges something to talk
11 about in making their vote and working collegially
12 together, hopefully not using argument to delay someone
13 else's docket. But the whole point here is to at least
14 give some reason why argument can be and maybe even in
15 certain circumstances should be denied and then basically
16 to provide guidance.

17 CHAIRMAN BABCOCK: Okay.

18 HONORABLE TERRY JENNINGS: And it also not
19 only provides guidance to the judges but to the litigants
20 reading the rule, if they're going to make a statement.
21 Well, you know, maybe they should include in their
22 statement, you know what, this isn't a decided area of the
23 law, there's something unique about the facts here that
24 you need to understand that an interaction between the
25 court might help you understand either the facts or the

1 law, so it provides guidance not to the court, but I think
2 the reason for a list is to also provide guidance to the
3 litigants to say, "Okay, here's what you need to show the
4 court to get a argument."

5 CHAIRMAN BABCOCK: You would agree to the
6 collapsing (a) into (b)?

7 HONORABLE TERRY JENNINGS: Yes. I think we
8 had a version like that at one time. The only reason I
9 think I like the idea of separating them out was because
10 it was easy to say "except as provided in paragraph (b),"
11 but that's simply a matter of style.

12 CHAIRMAN BABCOCK: Okay.

13 MR. LOW: Then you wouldn't have to say
14 certain things about (b) that you've already said in (a).

15 HONORABLE TERRY JENNINGS: Yeah. For
16 example, we could say -- if we could collapse them
17 together and say something along the lines of "If any
18 party who has filed a brief and who has timely requested
19 oral argument must be allowed to argue the case unless a
20 panel of three judges --"

21 CHAIRMAN BABCOCK: Skip, and then Sarah.

22 MR. WATSON: Judge Jennings, it's been a
23 long time since I was a law clerk, but -- and I may be
24 under a false premise here, but as I read this, it sounds
25 like we're assuming that all three judges have read the

1 briefs to determine if the legal arguments are adequately
2 presented in the briefs and the record before a decision
3 is made to grant oral argument, and that was not my
4 experience.

5 HONORABLE TERRY JENNINGS: Well, this rule
6 would require -- and I have heard that basically sometimes
7 some judges will decide cases by circulation without even
8 seeing the briefs. This rule would actually require the
9 judges before they vote to have examined the briefs to
10 make an intelligent decision on whether or not they have
11 argument.

12 MR. WATSON: And then examine them again
13 before the argument to prepare for it?

14 HONORABLE TERRY JENNINGS: Well, hopefully
15 they would read it a lot more thoroughly.

16 CHAIRMAN BABCOCK: Sarah.

17 HONORABLE TERRY JENNINGS: This would at
18 least require the judges to examine the brief, hopefully
19 looking at the statement we just voted on that, hopefully,
20 you know, the brief would be distributed timely to the
21 judges, they could examine the statement on whether oral
22 argument should or should not be permitted, and then make
23 a vote up or down on having an argument.

24 CHAIRMAN BABCOCK: Sarah, then Kent.

25 HONORABLE SARAH DUNCAN: I have three

1 points.

2 CHAIRMAN BABCOCK: Number one.

3 HONORABLE SARAH DUNCAN: Number one, as I
4 read (b)(4), which is basically the current rule, it
5 incorporates (1), (2), and (3). "If an appeal is
6 frivolous then oral argument will not significantly aid
7 the decisional process" and on down the list. Number two,
8 any time you make a list people are going to argue that
9 list is exclusive and that these are the only reasons oral
10 argument can be granted, and I just --

11 HONORABLE TERRY JENNINGS: Denied.

12 HONORABLE SARAH DUNCAN: Can be denied. I
13 just heard one that if the dispositive issue or issues
14 have been authoritatively decided we shouldn't be having
15 oral argument. That's simply not true. There are times
16 when an issue has been authoritatively decided, and that
17 is exactly the case you want to hear oral argument in
18 because this is a new twist or that authoritative decision
19 was 130 years ago and it was about, you know, carts and
20 we're talking about supersonic trains.

21 Number three, why do we want to incorporate
22 into the rule burdens on judges who don't have time to do
23 the job they already have, and we're giving them
24 additional duties? This is a matter if you can get this
25 passed at your court, that's great. The Fourth Court, if

1 one judge requests oral argument, we have oral argument.
2 At the Fourth Court all three judges have the opportunity
3 to look at the briefs before that decision is made. It is
4 -- certainly a 21-day notice doesn't go out until the
5 other judges have acquiesced to this decision. I am
6 totally against this rule, in case you couldn't tell by my
7 tone of voice. Sorry.

8 CHAIRMAN BABCOCK: So when we vote you're
9 voting "no"?

10 HONORABLE SARAH DUNCAN: I could be.

11 CHAIRMAN BABCOCK: Or "hell no." Buddy.

12 MR. LOW: But if one judge -- all of them
13 have agreed. If one judge looks at it and says, "I need
14 oral argument," then the other two say, "I don't have to
15 worry about it because it's out." I mean, we're not going
16 to have all three agreeing.

17 HONORABLE SARAH DUNCAN: I forgot my third
18 point. I had three.

19 CHAIRMAN BABCOCK: You said your third.

20 HONORABLE SARAH DUNCAN: I had another one
21 supersede that one.

22 CHAIRMAN BABCOCK: Number four.

23 HONORABLE SARAH DUNCAN: The third point is
24 that if anybody in this room thinks that a judge will not
25 use this rule to delay another judge's docket, there is a

1 bridge I would like to sell you.

2 MR. LOW: In Arizona?

3 HONORABLE SARAH DUNCAN: Could be.

4 HONORABLE TERRY JENNINGS: That's a
5 frightening thought. I can't imagine that occurring.
6 That's a frightening thought.

7 HONORABLE SARAH DUNCAN: And I'm sure none
8 of us at this table can.

9 HONORABLE TRACY CHRISTOPHER: Doesn't it
10 delay your own docket, too, if you have to go to it?

11 HONORABLE SARAH DUNCAN: I'm sorry?

12 HONORABLE TRACY CHRISTOPHER: Doesn't it
13 delay your own docket, too, if you have to go to the oral
14 argument? If you vote for it, you have to go to it?

15 HONORABLE SARAH DUNCAN: No, not if you
16 don't have the opinion. Just because you're going to the
17 oral argument doesn't mean you've read any briefs or
18 looked at the record or read any cases. It just means you
19 show up at oral argument.

20 HONORABLE TRACY CHRISTOPHER: But, I mean,
21 it's delaying all of you 30 minutes, right?

22 HONORABLE TERRY JENNINGS: Well, one point I
23 do tend to agree with what you said is about dispositive
24 issue or issues have been authoritatively decided.
25 Obviously a party can make a good faith argument for a

1 change in the law and so forth. Hopefully that party
2 would make such a statement in their statement regarding
3 oral argument and maybe persuade someone on the court
4 that, you know what, yes, the other side says these issues
5 have been authoritatively decided, but we want to argue
6 for that good faith.

7 CHAIRMAN BABCOCK: By the way, this is
8 exactly the Federal rule.

9 HONORABLE TERRY JENNINGS: Correct.

10 CHAIRMAN BABCOCK: I mean, word for word.

11 MR. GILSTRAP: No, (4) is new.

12 HONORABLE TERRY JENNINGS: There is some
13 slight differences, and we did break out the last (d).

14 CHAIRMAN BABCOCK: Yeah, they have a
15 three-part thing, but our (4) is in their (3).

16 HONORABLE TERRY JENNINGS: They combined (3)
17 and (4) together, and we broke them out.

18 CHAIRMAN BABCOCK: Right. Kent.

19 HONORABLE KENT SULLIVAN: I just want to
20 make a brief philosophical comment, and that is we talked
21 and the standard for our debate and discussion seems to be
22 what will aid the court, and I at least wanted to add to
23 ask the question of whether we shouldn't be talking about
24 what might aid the litigants. That is, the question of,
25 if you don't mind the phrase, adequate customer service is

1 something that we ought to consider.

2 The question of the perception that the
3 litigants have of the fairness and thoroughness of the
4 process is something we ought to consider. The question
5 of the litigants' credibility -- or the credibility of the
6 process in the minds of the litigant is something we ought
7 to consider, and I think it is effective. I think people
8 feel better when they get their say or they watch their
9 lawyer get their say, because -- and you do deal with
10 issues that come up that I think we all have to
11 acknowledge. You do hear people grumble saying, "I
12 question whether the court ever read what I submitted." I
13 question -- you know, "I question this, I question that."
14 We talk about the vanishing jury trial a lot, well,
15 vanishing jury trials become vanishing appeals, it seems
16 to me, and that this is all part of much the same thing.

17 CHAIRMAN BABCOCK: So you're in favor of the
18 rule?

19 HONORABLE KENT SULLIVAN: Well, I'm in favor
20 of the notion of some customer service and that we give
21 some eye towards who the clients or customers of the
22 process really are.

23 HONORABLE TERRY JENNINGS: Well, that's a
24 different approach obviously because --

25 HONORABLE KENT SULLIVAN: I agree.

1 HONORABLE TERRY JENNINGS: -- our approach
2 is, is to -- okay, oral arguments are on decline, what can
3 we do as far as getting the attention of the
4 interimmediate appellate court judges as far as having a
5 uniform rule. You know, there is this wide variety as far
6 as, you know, argument being granted in some courts and
7 not granted in other courts. Within courts there is a
8 wide discrepancy, so the idea is to have some uniform
9 standards as in the Federal rule of, okay, if a court
10 unanimously agrees that argument would be unnecessary in
11 this case for these reasons -- so in a way it's a way to
12 tie the hands of the court, you know, recognizing --
13 recognizing that it is the right to oral argument and to
14 take away that right the court ought to have some good
15 reasons and it ought to unanimously agree on one of those
16 reasons.

17 CHAIRMAN BABCOCK: Okay. Justice Gray.

18 HONORABLE TOM GRAY: That was a perfect
19 ending to where I wanted to begin, because --

20 CHAIRMAN BABCOCK: We've come full circle?
21 Is that it?

22 HONORABLE TOM GRAY: Yeah. I think Justice
23 Jennings and I, if we had to write opinions on this, there
24 would be a split decision, and I want to do this with
25 regard to -- or without regard to the procedure that's

1 used at the Tenth Court, and I say "procedure" because
2 there is actually different ways within our own court of
3 how a case is decided to be argued or not.

4 HONORABLE JAN PATTERSON: Three different
5 versions?

6 HONORABLE TOM GRAY: No, just two. But the
7 intermediate appellate courts decide over 10,000 appeals a
8 year. The large majority are now currently decided based
9 upon the briefs, and I think the presumption should be
10 that the brief adequately presents the issues and the case
11 for decision. The statement regarding oral argument that
12 we've agreed to include in the rules or recommend to the
13 Supreme Court be included in the rules should be the --
14 should be to show why there's some reason that this appeal
15 cannot be adequately presented in the briefs.

16 To me that means that the default should be
17 that there is no oral argument unless you show me a reason
18 why there should be in this case; and that's a motion
19 basically like any other motion that should be decided by
20 majority, and what -- which is philosophically the way I
21 approach it; and my response to a request, whether it's
22 made under the current rules or just on the brief is, is
23 oral argument going to help me decide this appeal; and in
24 response to the litigants that appear at us or before our
25 court, my question is how many results have been affected

1 by oral argument and isn't that kind of scary if you think
2 that number is pretty high? Because if you think it's
3 oral argument that is affecting it, that means it's
4 something that happens on the day of submission, not
5 something that you got to prepare for, brief for, and
6 really, the fundamental difference between the appellate
7 process and the trial process --

8 CHAIRMAN BABCOCK: You think it is high?

9 HONORABLE TOM GRAY: No, I think it's very
10 low.

11 CHAIRMAN BABCOCK: That's conventional
12 wisdom.

13 HONORABLE TOM GRAY: Yeah, I mean, I think
14 the number of the results of appeals that are
15 differentiated because of oral argument is extraordinarily
16 low. I have no empirical data to support that, just
17 anecdotal.

18 CHAIRMAN BABCOCK: But it does make the
19 customers feel better, Kent's point.

20 HONORABLE SARAH DUNCAN: But --

21 HONORABLE TERRY JENNINGS: I agree with
22 that --

23 HONORABLE TOM GRAY: Wait, wait, wait. I'm
24 not done.

25 HONORABLE SARAH DUNCAN: Wait, yeah.

1 HONORABLE TOM GRAY: I'm not done.

2 CHAIRMAN BABCOCK: Sorry.

3 HONORABLE TOM GRAY: I want to add one other
4 comment with regards specifically to the proposed text of
5 the rule, and I know this is probably unintentional, but
6 it would mean that a panel of three could prevent oral
7 argument in an en banc review.

8 CHAIRMAN BABCOCK: Sarah.

9 HONORABLE SARAH DUNCAN: I would like to
10 respond. I agree with everything Chief Justice Gray has
11 said, and I would like to respond specifically to Judge
12 Sullivan's comment and the concept of the customer. I
13 think everybody around this table should be very careful
14 about how you define who the customer is.

15 I had people say I had constituents. In my
16 view I had no constituents. We had a customer
17 satisfaction survey done at the Fourth Court, and there
18 was a level of dissatisfaction on oral argument. Well, I
19 did not consider the lawyers to be the customers of the
20 Fourth Court of Appeals. The customers of the Fourth
21 Court of Appeals were the residents of the State of Texas.
22 That's what the judicial system -- is the genesis of our
23 state judicial system, and as I tried to tell lawyers,
24 there is an inherent tension and always will be between
25 getting oral argument in every case where one of the

1 lawyers wants oral argument and getting decisions out
2 quickly.

3 At the Fourth Court we had an internal
4 operating procedure that once a case was submitted a draft
5 opinion would issue within three months, and when I left,
6 every single person at the court was in compliance with
7 that rule. I was always the late one, so nobody else at
8 the court was late, but there is an incredible tension
9 between those two goals, and I would hate to see oral
10 argument granted in every single case because one lawyer
11 wants to get board certified in civil appellate law than
12 to have all the cases on the court's docket get decided in
13 a timely manner, and that's what you-all are messing with
14 here. That's what we're messing with.

15 CHAIRMAN BABCOCK: Frank. Quit messing with
16 us.

17 MR. GILSTRAP: I think we've strayed too far
18 into the area of philosophy. You know, yes --

19 HONORABLE SARAH DUNCAN: Well, it's not
20 going your way, is it?

21 MR. GILSTRAP: Well, okay. But the problem
22 is that, yes, the courts should have some discretion in
23 granting oral argument, but apparently in some courts it's
24 just gone too far. I mean, there's a court in the state
25 of Texas that hears one oral argument a year, and that's

1 just not enough. Apparently there needs to be some way --
2 and there is apparently a lot of dissatisfaction among a
3 lot of lawyers about this, you know, and yes, oral
4 argument may not affect that many cases, but we can go too
5 far there. I remember sitting in a seminar and a Fifth
6 Circuit judge said telling me -- telling the audience that
7 he didn't think the lawyers really made any difference in
8 the outcome of a case. I swear that happened.

9 The point is this: It's gone too far. We
10 need a rule that will curtail that. You know, a rule
11 something like this will help. Maybe we can disagree on
12 whether or not it should be unanimous or just two members
13 of the panel, but this will help. Why don't we decide it
14 and move on?

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: I just had a question so I'll
17 know, were you talking about if one member -- it didn't
18 have to be one member, it needs two members to vote in
19 order to get oral argument? In other words, unanimous.
20 It didn't have to be just one. One couldn't get it? You
21 say it takes two?

22 HONORABLE TOM GRAY: As long as you're not
23 talking about the procedure in my court.

24 MR. LOW: No. Well --

25 HONORABLE TOM GRAY: I mean, what I'm

1 talking about would be an appropriate process would be
2 that a majority of the judges deciding the case -- because
3 it may be an en banc decision such that a majority of the
4 members of the court should decide.

5 MR. LOW: I'm not addressing the en banc,
6 but I'm talking about just a three-member court like
7 yours. The way the rule is, that if any one judge
8 requests they get it, you would say it would be two, if
9 two judges, majority. I just wanted to see what was the
10 real difference in what you suggest and what's here.

11 CHAIRMAN BABCOCK: Skip.

12 MR. WATSON: This is real important to the
13 few of us who make our living doing exactly this. Because
14 that's the way I try to make a living, I ask judges when I
15 have the chance "How do I do this better," you know, what
16 makes a difference, not in a particular case, but just
17 "What do you need from me that I'm not giving you or that
18 I am giving you?" It was one of those conversations I had
19 with a Fifth Circuit judge some years ago that was
20 enlightening to me that creates what I think is a
21 misconception of what the Federal rule does. I asked,
22 "Since you're reading the briefs, you know, a month ahead
23 of time to make the decision on whether to grant oral
24 argument or whether it would contribute to the decisional
25 process, why can't you send us a letter -- I mean, when

1 you send us the letter saying argument is granted saying
2 'It's granted on this one issue, focus on this, don't
3 prepare on all eight issues. We're granting it for one
4 purpose, to decide this, come prepared to speak on
5 everything in the record and everything in the case law on
6 this tiny point.'" That's what I need as an officer of
7 the court to serve you.

8 The answer was, "Well, Skip, that's decided
9 on the basis of a staff memo. We haven't read the briefs.
10 You know, I'll read the briefs if I'm lucky the weekend
11 before the appeal." You know --

12 HONORABLE TERRY JENNINGS: So they don't
13 even follow their own rule, is what you're saying.

14 MR. WATSON: Surprise. I mean, that's the
15 way it works, and that's the way -- I know you will read
16 the briefs, but my earlier comment was I think -- I mean,
17 I'm being very respectful in saying this, Justice
18 Jennings, but I think this is very well-intentioned and
19 that not all justices are necessarily as eager to read the
20 briefs a month ahead of time as you are.

21 HONORABLE TERRY JENNINGS: It's a matter of
22 conscience then. If one judge is going to read the briefs
23 and make a decision that, you know what, argument would be
24 helpful to me in this case, therefore, I vote for
25 argument, and the other two judges decide not to read the

1 briefs and automatically knee-jerk say, "I vote to reject
2 argument in this case," well, that's a matter of
3 conscience, but at least you've gotten through to that one
4 judge who is going to follow the rule and examine the
5 briefs.

6 CHAIRMAN BABCOCK: Our three-judge panel of
7 Justice Bland, Patterson, and Gaultney will speak in that
8 order.

9 HONORABLE JANE BLAND: Okay. On the single
10 judge versus the majority, the single judge works so much
11 better because if we made this a majority it would be
12 harder than what we have to do now. Because right now if
13 the judge that initially looks at the case and has handled
14 it, you know, in the presubmission stage decides there's
15 argument, there's argument. He or she doesn't have to go
16 find another vote, and, you know, it's just -- that's just
17 another step in the process that we don't need, and all
18 this rule is saying is if that judge at first pass says,
19 "I don't think any argument," but one of the other judges
20 looks at it and says, "Yeah, argument would help me," they
21 can do the same thing. They can just put it on the
22 argument calendar, and that's all we're talking about is
23 putting it on the argument calendar.

24 As far as changing decisions, the
25 decision-making process is collaborative at the appellate

1 level, so instead of the lawyers arguing and the judge
2 deciding, you have the judges arguing with each other and
3 then deciding, and I think it is helpful for the lawyers
4 in a case to have at least a glimpse into that
5 collaborative process and some ability to participate, and
6 that's what oral argument provides. It may not change the
7 outcome, but it allows the judges to test their various
8 theories of the case with the lawyers' input.

9 And so I would propose -- I mean, I would
10 vote for the rule that Justice Jennings proposes as it is,
11 but I would not vote for it if it required a majority,
12 because that would just require another vote, and I think
13 it's -- I think we're better off with what we have now
14 than we would if we incorporated something that would -- I
15 think that would slow down the process if we had to get a
16 majority.

17 CHAIRMAN BABCOCK: Justice Patterson, do you
18 vote with Justice Bland or --

19 HONORABLE JAN PATTERSON: I do. I do.

20 CHAIRMAN BABCOCK: Okay. So it doesn't
21 matter what Gaultney says?

22 HONORABLE JAN PATTERSON: I'm sure that --

23 HONORABLE DAVID GAULTNEY: But I do get oral
24 argument.

25 HONORABLE JAN PATTERSON: I'm sure he

1 agrees. Remember how we got to this point. It was by
2 adding the statement regarding oral argument, which
3 originally I had opposed but I think is helpful to this
4 process now because it is a shorthand way to make this
5 decision, and it gives the judges some additional
6 information. So having added the statement, I understand
7 why the Fifth Circuit judge would say to hone it any finer
8 requires so much more time, but I think this is probably a
9 decision that's made by judges, by the way, in most of our
10 courts, because it's a very important one. So I think by
11 adding that statement that gets us there.

12 I don't think we have to get into the whole
13 subject of and philosophy of oral argument today to
14 address the importance of this rule, but I will add one
15 other thing. With limited oral argument what you see is
16 that the large cases get argued, in our court the
17 administrative cases, the -- and the criminal cases suffer
18 and the smaller family business cases suffer, so there are
19 a lot of categories of cases that suffer under more
20 limited oral argument.

21 I would say that this does not slow down the
22 process, because the way it works in our court is that
23 when the briefs first come in and you see on the briefs
24 "request oral argument," that is when this would be
25 circulated and a decision made about whether the judges

1 agree to oral argument. The way it's made now is that
2 there's a default until a later time of submission so that
3 if the other two judges, they've never seen the briefs or
4 the opinion or anything about the case until some later
5 date now, so the decision is deferred now because the
6 authoring judge makes the decision about oral argument
7 initially. So to me this would speed up the process, and
8 it would not allow people to -- you know, I can't imagine
9 the slowing docket business down, but this would move it
10 up front, and I think it would be transparent, and I
11 support this rule.

12 CHAIRMAN BABCOCK: Justice Gaultney.

13 HONORABLE DAVID GAULTNEY: I support the
14 proposal, too, and essentially it's the way our court
15 works on this issue, and we're a small court, so, you
16 know, applying the way we do it may not be appropriate
17 throughout the state, but the system works, and we've done
18 exactly what you suggested. So, for example, we take up
19 oral argument review as part of our weekly conference, and
20 if one judge wants oral argument, we set it. And we had a
21 case, a criminal case, where there were 18 issues, you
22 know, you know, excellent attorneys involved. We wanted
23 argument on essentially three, and we told them that. So
24 the rule, I think, can work.

25 As far as the comment that -- and I know

1 it's a drafting error that Tom is referring to. I think
2 we could -- as far as en banc consideration, I think maybe
3 it should read something like "After examination of the
4 brief, the justices who will decide the case unanimously
5 agree," but, you know, with that one clarification I
6 support the rule.

7 CHAIRMAN BABCOCK: Okay. Justice Jennings.
8 You know, they teach you when you're winning you ought to
9 quit.

10 HONORABLE TERRY JENNINGS: Oh. May I just
11 make two points for the record, and hopefully I won't blow
12 it? In regard to this whole idea of delay, for example,
13 and I'm going to pick on my court just because it's my
14 court, and I can face my colleagues if I have to. We had
15 -- for example, in 2005 we had 52 arguments. Now, we're a
16 nine-member court. If each judge on our court -- you
17 know, we do six cases a week basically. We set panels of
18 three and each judge has two cases a week, generally
19 speaking; but just on a nine-member court, if each judge
20 on a panel set two arguments a month, two arguments a
21 month; and now I'm starting to sound like Sally Struthers,
22 but if we set two arguments a month times three judges,
23 that would be six arguments per panel. Well, over ten
24 months that we hear arguments that would be 180 arguments.
25 So we would go from 52 arguments to 180 arguments. How

1 much time of the court would that take? If you're sitting
2 in panels of three, two judges each, for one month,
3 assuming 30-minute arguments, that would be three hours
4 per panel. I have three hours to hear argument every
5 month.

6 CHAIRMAN BABCOCK: You wrote this closing
7 ahead of time, didn't you?

8 HONORABLE SARAH DUNCAN: That is not a fair
9 assessment of how much time oral argument takes, Terry --

10 HONORABLE TERRY JENNINGS: Well --

11 HONORABLE SARAH DUNCAN: -- and you know it,
12 because you've prepared for oral argument.

13 HONORABLE TERRY JENNINGS: Well, you prepare
14 for your cases as well. I hate to do this, but I'm going
15 to pull out John Marshall Harlan.

16 MR. GILSTRAP: All right. Go for it.

17 HONORABLE TERRY JENNINGS: And there is a --

18 CHAIRMAN BABCOCK: You did write this ahead
19 of time.

20 HONORABLE TERRY JENNINGS: There is a
21 philosophical difference -- and I'm going to shut up after
22 this. This is John Marshall Harlan, II. "I think that
23 there is some tendency to regard the oral arguments as
24 little more than a traditionally tolerated part of the
25 appellate process. The view is widespread that when a

1 court comes to the hard business of a decision it is the
2 briefs and not the oral arguments which count. I think
3 that view is a greatly mistaken one," and he lists a
4 number of reasons why, and the final reason is the most
5 important. "The most important reason that that concept
6 is wrong is the job of the courts is not merely one of an
7 umpire in disputes between the litigants. Their job is to
8 search out the truth, both as to the facts and the law,
9 and that is ultimately the job of the lawyers, too."

10 So the point is, as Kent Sullivan was
11 saying, the lawyers have a say in this, and the only way
12 to get that interaction -- and, yes, a judge's mind may or
13 may not be changed, but argument may be helpful if for no
14 other reason, it increases your comfort level with your
15 decision. It doesn't have to necessarily change your mind
16 but increase your comfort level, but the point is, is
17 you're either going to have a right to oral argument in
18 this state or you're not. There's one philosophy that
19 says, no, you don't have a right to oral argument. The
20 presumption is, is you have to tell me why you have to
21 have an argument, but the way the rule is titled, "Right
22 to Argument," unless we want to change that title, you
23 know, we ought to have good reasons for denying that
24 right.

25 CHAIRMAN BABCOCK: Okay. Rebuttal?

1 HONORABLE SARAH DUNCAN: I just want to say
2 a couple of things. If anybody around this table thinks
3 that this iteration of the rule is going to change the
4 number of oral arguments, I think you're, again, being
5 very naive.

6 CHAIRMAN BABCOCK: You think it will or
7 won't?

8 HONORABLE SARAH DUNCAN: I think it
9 absolutely will not. I mean, in a court that's down to
10 four oral arguments maybe this will make a point with some
11 of those judges that they ought to hear more arguments.
12 For those courts like the Fourth Court that if one judge
13 requests oral argument it's going to get granted and the
14 court really tries to follow the "significantly aided"
15 language, no, I don't think it's going to change the
16 number of oral arguments at all.

17 I would like to change the title, because I
18 don't think there is a right to oral argument, and what
19 I'd like to change is the time limits on oral argument.
20 If the case is worth being argued, was always what I --
21 and I didn't win this one at the Fourth Court -- then
22 let's have something more than a token 20 minutes. Let's
23 really get into it, but nobody wanted to do that. That's
24 why I think this is all political. It's all political.
25 It's a function of having elected judges, and I think it's

1 very unfortunate.

2 CHAIRMAN BABCOCK: Okay. Stephen.

3 HONORABLE STEPHEN YELENOSKY: Well, I was
4 going to let this drop, but because Justice Jennings
5 brought it up, I don't think your proposal establishes a
6 right to oral argument, either. It establishes the right
7 on the part of any one court of appeals judge to impose or
8 require oral argument. The litigant has no right
9 whatsoever. There is nothing reviewable about the
10 decision of three judges to forego it, so let's be honest.
11 The moment 39.8 was put in, the right to oral argument
12 went away.

13 HONORABLE SARAH DUNCAN: (Applauding)

14 CHAIRMAN BABCOCK: With applause. Okay.
15 We're going to vote on this. And we're going to vote on
16 the rule, and Jody is going to fix collapsing (a) into (b)
17 if the vote's in favor, if we vote in favor, and he'll
18 work on the en banc thing, I'm sure.

19 So everybody, with those two caveats,
20 everybody who is in favor of rule -- the proposed Rule
21 39.1, raise your hand. Carlos you up or down?

22 MR. LOPEZ: I couldn't tell which one was
23 which.

24 CHAIRMAN BABCOCK: Okay. All those opposed?
25 Sarah gets two votes because she feels strongly.

1 By a vote of 22 to 4 -- 5 if Sarah gets two
2 votes -- the Chair not voting, it passes, so let's go on
3 to 41, I think, Sarah. Is that next?

4 HONORABLE SARAH DUNCAN: Yeah. This one, I
5 think the controversy is over.

6 CHAIRMAN BABCOCK: Yeah, that's what we
7 thought about the last one.

8 HONORABLE SARAH DUNCAN: But I sure wouldn't
9 guarantee it at this point. All the subcommittee was
10 trying to do on motions for rehearing -- there are two
11 points. In 41, we're just trying to get the language
12 right about who the Chief Justice of the Supreme Court can
13 appoint to decide if two remaining judges on a panel or a
14 court sitting en banc is unable to reach a decision.
15 There are two alternatives, maybe we should just vote on
16 the alternatives.

17 The first is an "active court of appeals
18 justice from another court of appeals, a qualified retired
19 or former appellate justice or appellate judge, or a
20 qualified active district court judge." That's option
21 one.

22 Option two is "an active court of appeals
23 justice from another court of appeals, a retired or former
24 appellate justice or appellate judge," note that
25 "qualified" isn't in there, "or an active district judge"

1 -- "district court judge to sit on the panel to consider
2 the case as provided in Chapter 74 and 75 of the
3 Government Code." That's option two.

4 My concern with option two is a not
5 well-researched concern that there are provisions other
6 than in Chapter 74 and 75 of the Government Code for
7 appointing a tie-breaking judge. Does anybody else have
8 any knowledge about that?

9 HONORABLE TOM GRAY: You asked if there were
10 other provisions than this rule for appointment of a
11 tie-breaking judge?

12 HONORABLE SARAH DUNCAN: Constitutional or
13 statutory.

14 CHAIRMAN BABCOCK: Yeah, other than 74 or 75
15 of the Government Code.

16 HONORABLE SARAH DUNCAN: Uh-huh.

17 CHAIRMAN BABCOCK: Other than Chapter 74 or
18 75 of the Government Code.

19 HONORABLE STEPHEN YELENOSKY: Why can't you
20 just say "where provided by law"? Maybe there will be in
21 the future.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE SARAH DUNCAN: Yeah. If not now
24 then maybe in the future.

25 HONORABLE STEPHEN YELENOSKY: I mean,

1 whenever you put a statute in the rules you risk that
2 problem.

3 HONORABLE SARAH DUNCAN: It just seems like
4 there is something for a particular type of case out
5 there.

6 CHAIRMAN BABCOCK: Well, wasn't a private
7 attorney once appointed by the Governor to sit on the
8 Supreme Court? Wasn't it Tom Luce?

9 MR. HAMILTON: Woodmen of the World.

10 HONORABLE NATHAN HECHT: Yeah.

11 CHAIRMAN BABCOCK: So how did that happen?

12 HONORABLE TOM GRAY: Well, there's a --

13 HONORABLE NATHAN HECHT: I don't know.

14 HONORABLE TOM GRAY: There is a difference
15 in the power of appointment and where it rests, depending
16 on whether or not the issue is recusal or
17 disqualification; and there is a view that it depends on
18 whether or not a majority of the court, I believe it is,
19 whether or not they are disqualified; and in that case,
20 for example, if there were two members of our court that
21 were disqualified, the decision and the appointments would
22 be by the Governor.

23 HONORABLE SARAH DUNCAN: That's what's been
24 concerning me.

25 HONORABLE TOM GRAY: And if there is only a

1 recusal of two then that is filled by the Chief Justice,
2 and so there's some -- there are some issues there, but
3 having examined those rather closely, I don't know that
4 that would impact what we're trying to do here. There's a
5 lot of other --

6 HONORABLE SARAH DUNCAN: No, this limits it
7 to appointments by the Chief Justice.

8 HONORABLE TOM GRAY: I'm not sure that we by
9 rule can modify that problem or address that problem
10 that's created by the constitution in the -- when the
11 issue is disqualification of a majority of the members of
12 a court.

13 HONORABLE SARAH DUNCAN: Does somebody
14 remember, anybody, this has not been a problem, has it?
15 Why are we even messing with this?

16 MR. HUGHES: The whole genesis of this was
17 the addition of the active district court judge because
18 that was new from the Legislature, and so -- and as part
19 of doing that we then realized that the language in the
20 existing language was actually inconsistent. In some of
21 the provisions it says "qualified" and some of them it
22 doesn't. Then there were people who were -- introduced
23 the idea of, well, the rule should reference the statutory
24 provision, but the response to that was, well, it's
25 generally that it's the Chief Justice making this and as

1 long as the Chief Justice is aware of the -- he doesn't
2 need to be reminded that it's Chapter 74 and 75 or
3 elsewhere, but that was where it came from.

4 CHAIRMAN BABCOCK: Justice Gaultney.

5 HONORABLE DAVID GAULTNEY: I think, Jody, am
6 I correct, that really the choice is between using the
7 word "qualified," which some members of the committee
8 thought was ambiguous, what does that mean, or use --
9 referencing the exact statutes that would provide the
10 qualification, provide the statutory authorization, so the
11 people who thought that "qualified" was fine thought,
12 well, whoever is going to be doing the appointment will
13 know what the requirements are, so we really don't need to
14 spell it out. The people who were troubled by the use of
15 the word "qualified" wanted more specificity. I think
16 that was the distinction, right?

17 MR. HUGHES: That's a better articulation.

18 HONORABLE TERRY JENNINGS: I don't know if
19 this -- I can't seem to remember. I thought Bill was
20 concerned about the idea of the individuals affected by
21 this, that they would know what they were dealing with,
22 the litigants.

23 HONORABLE SARAH DUNCAN: I think I'd like to
24 propose an alternative view, and that is that we just put
25 "active district court judge" in here and not mess with

1 the rest of it.

2 CHAIRMAN BABCOCK: Forget about everything
3 else?

4 MR. LOW: That we include what, Sarah?

5 HONORABLE SARAH DUNCAN: That we just -- if
6 the problem we're trying to address was that the
7 Legislature has said that an active district court judge
8 can now be appointed --

9 MR. LOW: Uh-huh.

10 HONORABLE SARAH DUNCAN: -- to hear a case
11 in an appellate court, then given that the rest of the
12 language hasn't caused a problem up till now, that that's
13 all we do.

14 CHAIRMAN BABCOCK: What do you think, Jody?

15 MR. HUGHES: The only -- I think that's a
16 good idea except I would say that 41 is currently -- the
17 word "qualified" appears in subsection (a). Let me get it
18 in front of me. It appears in one of the two provisions
19 and not the other one. I don't think there's any -- we
20 were just trying to make it consistent.

21 HONORABLE SARAH DUNCAN: But that's part of
22 what I'm saying, is that hasn't caused a problem, right?

23 MR. HUGHES: Not that I know of, but I don't
24 know -- I mean, I'm not sure what would be the problem of
25 just making it consistent, either taking "qualified"

1 completely out of both of it or putting it in both. It
2 just seems to me if we're going to take the trouble to fix
3 the rule at this point, it should probably be consistent,
4 but I agree that it's not causing --

5 CHAIRMAN BABCOCK: So there are two things,
6 make "qualified" consistent throughout the rule or not,
7 either leave it in or take it out, and two, add "active
8 district court judge"; is that right? Those are the two
9 changes that the rule needs, right?

10 HONORABLE SARAH DUNCAN: We could actually
11 not -- instead of putting "qualified" in the other one we
12 could take "qualified" out of the one.

13 CHAIRMAN BABCOCK: Right. Right.

14 HONORABLE SARAH DUNCAN: Two ways of making
15 it consistent.

16 CHAIRMAN BABCOCK: Anybody got any
17 preference? Buddy.

18 MR. LOW: No, I'm ready to vote. I'm
19 voting, and you haven't even called for a vote.

20 CHAIRMAN BABCOCK: You feel strongly both
21 ways.

22 MR. LOW: I'm voting.

23 CHAIRMAN BABCOCK: Well, it seems to me
24 redundant to say "qualified." I mean, what's the chief
25 going to do, appoint an unqualified person?

1 MR. HUGHES: The rule can't give -- is not
2 trumping the statutory at all.

3 HONORABLE SARAH DUNCAN: Right. That's my
4 point about taking it out.

5 CHAIRMAN BABCOCK: Yeah, so take it out and
6 put "active district judge" in. Richard.

7 MR. MUNZINGER: Is "eligible" a satisfactory
8 substitute for "qualified"? Does that help solve the
9 problem?

10 HONORABLE SARAH DUNCAN: That's the same
11 problem. Why do we need it at all? The Chief Justice is
12 going to appoint from a list.

13 MR. WATSON: We need to take "qualified" out
14 of the other one so people can argue, okay, now he can
15 appoint an unqualified, that was the reason they took it
16 out.

17 CHAIRMAN BABCOCK: Yeah, they took it out.

18 HONORABLE SARAH DUNCAN: Skip is saying
19 exactly, exactly, why I don't want to change what doesn't
20 need to be changed, because he will make this argument.

21 MR. WATSON: I didn't mean to set her off.

22 HONORABLE SARAH DUNCAN: And Terry will
23 accept it.

24 CHAIRMAN BABCOCK: Anybody --

25 HONORABLE SARAH DUNCAN: And we're laughing

1 on the record.

2 CHAIRMAN BABCOCK: Anybody feel strongly
3 about "qualified" or Richard's substitute "eligible,"
4 anybody feel strongly about that one way or the other?

5 HONORABLE TERRY JENNINGS: Just one caveat.
6 I think Bill's point --

7 CHAIRMAN BABCOCK: You do know you won the
8 last one?

9 HONORABLE TERRY JENNINGS: I know. Bill's
10 not here, but I think Bill's point was, well, this would
11 educate the litigants so that if a mistake were made it
12 would refer them to a place where they could make the
13 appropriate challenge.

14 CHAIRMAN BABCOCK: But Sarah's point, which
15 is well-taken, is that, hey, there may be something else
16 that it may change. That's what Judge Yelenosky said,
17 so --

18 HONORABLE SARAH DUNCAN: Well, and further,
19 the Chief Justice doesn't make mistakes.

20 CHAIRMAN BABCOCK: Good point.

21 HONORABLE SARAH DUNCAN: Not this one or any
22 other one.

23 HONORABLE TERRY JENNINGS: Now who's being
24 political.

25 CHAIRMAN BABCOCK: Okay. Let's go to 49.

1 HONORABLE SARAH DUNCAN: Okay. Against my
2 recommendation, on this one what the subcommittee is
3 trying to do is eradicate the further motion for
4 rehearing, although it left it in the title, so you might
5 want to -- to help you understand what the subcommittee is
6 trying to do, take out "further motion" in the title of
7 the rule.

8 MR. HUGHES: We took it out.

9 HONORABLE SARAH DUNCAN: Huh?

10 MR. HUGHES: It is out in here, isn't it?

11 HONORABLE SARAH DUNCAN: On page 12, Rule
12 49?

13 CHAIRMAN BABCOCK: No. It's not in the
14 draft we have, Jody.

15 HONORABLE SARAH DUNCAN: The title of the
16 rule.

17 HONORABLE STEPHEN YELENOSKY: It's in my
18 draft.

19 HONORABLE NATHAN HECHT: We've got a secret
20 draft.

21 CHAIRMAN BABCOCK: Yeah, they have a secret
22 draft.

23 HONORABLE SARAH DUNCAN: Oh, well, I didn't
24 get the secret draft, so I'll let Jody talk.

25 MR. HUGHES: No, I'm sorry. I just --

1 HONORABLE SARAH DUNCAN: No, go ahead. You
2 have the secret draft. Go for it.

3 MR. HUGHES: Hopefully the draft isn't
4 different, but I guess it is. It's just consolidating --
5 the procedure is the same, but the problem is throughout
6 Rule 49 there are some references to motion for rehearing
7 that appear to implicitly include further motions, and
8 there are other places where further motion is separately
9 referenced, which kind of makes it hard to understand if
10 you're looking through the rule which ones we're really
11 talking about to include further motions and which ones
12 are not, so Bill had the idea of getting rid of the
13 language "further motion for rehearing" in 49.5, moving
14 the procedure for filing a further motion into Rule 49.1
15 and then just making it -- collapsing it and making it
16 clear that it's just a new -- it's just a different motion
17 for rehearing under limited circumstances.

18 HONORABLE SARAH DUNCAN: Instead of a
19 further motion for rehearing -- you've got to be quick to
20 catch this -- it's another motion for rehearing.

21 MR. HUGHES: Yes.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE SARAH DUNCAN: And it also treats
24 a motion for reconsideration en banc like a motion for
25 rehearing and collapses 49, and is that 51? 53? 53, I

1 think. Because if you'll look at the bottom of page 13,
2 subsection 49 -- new subsection 49.6 is entitled "En Banc
3 Reconsideration," and onto page 14 it's moving the en banc
4 into the motion for rehearing rule. And I think part of
5 the thought here was that we -- part of this comes from
6 the plenary power rule and part of it comes from the
7 motion for rehearing that overlaps with the Supreme
8 Court's jurisdiction.

9 CHAIRMAN BABCOCK: In 53.7(b)?

10 MR. HUGHES: Right.

11 HONORABLE SARAH DUNCAN: That's where it
12 comes from, right.

13 CHAIRMAN BABCOCK: All right. Do we have
14 discussion on the changes to 49.1, 2, 3, 4, and 5?
15 Anybody?

16 HONORABLE SARAH DUNCAN: See, this isn't as
17 sexy as oral argument.

18 CHAIRMAN BABCOCK: No. You called this one.
19 All right. Any -- there is no discussion. Any problems
20 with doing what the subcommittee proposes? Seeing no
21 dissent, then it passes by acclamation.

22 HONORABLE SARAH DUNCAN: And that would, as
23 far as I know, conclude the subcommittee's report.

24 CHAIRMAN BABCOCK: Man, are you good. Well,
25 that's great. Then we move on to the next agenda item,

1 which Gilstrap and Judge Lawrence have, which is the
2 proposed amendment to rule --

3 HONORABLE SARAH DUNCAN: Oh, I'm sorry. I'm
4 sorry. There are a couple of more things. I just looked
5 at my notes. I think the original petitions we did last
6 time, didn't we?

7 MR. HUGHES: And it was sort of -- it was a
8 vote for it -- you're talking about the verification
9 thing?

10 HONORABLE SARAH DUNCAN: Uh-huh. Uh-huh.

11 MR. HUGHES: There was a reversal in the
12 Duncan/Baron --

13 HONORABLE SARAH DUNCAN: We lost.

14 MR. HUGHES: No, it won and then --

15 HONORABLE SARAH DUNCAN: We lost on the
16 reversal.

17 MR. HUGHES: And then there was a vote to
18 not change the rule, period, so that's where it stands.

19 HONORABLE SARAH DUNCAN: Big mistake. Big
20 mistake.

21 MR. HUGHES: 53.2 is new, though, since last
22 time.

23 HONORABLE SARAH DUNCAN: Yeah.

24 CHAIRMAN BABCOCK: 53.2? Okay. I don't see
25 that on my --

1 HONORABLE SARAH DUNCAN: 53.2 in my mind is
2 part of the motion for rehearing rule.

3 MR. HUGHES: Okay.

4 HONORABLE SARAH DUNCAN: If a motion for
5 rehearing is pending in a court of appeals at the time a
6 petition for review is filed in the Supreme Court, you
7 need to include that in your statement of the case.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE SARAH DUNCAN: And I guess I --

10 CHAIRMAN BABCOCK: Okay. Any discussion on
11 that? 53.2, subpart (9), subpart (d)(9).

12 HONORABLE SARAH DUNCAN: There is one other
13 maybe more difficult problem that we might could get a
14 straw vote on.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE SARAH DUNCAN: We talked at the
17 last meeting about using initials in cases involving
18 termination of parental rights rather than the names of
19 the children, and Jody had made a fine proposal on this,
20 but I think some people, including Bill, have decided it's
21 really more complicated than that proposal encompasses,
22 and I think part of the reason Bill thinks it's more
23 complicated is that in his mind using initials rather than
24 names is not restricted to opinions.

25 CHAIRMAN BABCOCK: Not restricted to what?

1 HONORABLE SARAH DUNCAN: Opinions. That it
2 would be a pervasive requirement to use initials. I guess
3 the reason in my simplistic mind it wasn't all that
4 complicated is I was only thinking of opinions that would
5 be more available for public view. Do other members of
6 the committee -- did they have a view of when we were
7 going to require litigants to use initials versus names of
8 children when we were talking about terminating parental
9 rights?

10 CHAIRMAN BABCOCK: Sarah, what rule are we
11 talking about?

12 HONORABLE SARAH DUNCAN: We're not talking
13 about a rule.

14 MR. HUGHES: There isn't one, is part of the
15 problem.

16 HONORABLE SARAH DUNCAN: That's part of the
17 problem.

18 CHAIRMAN BABCOCK: Was that part of the
19 charge?

20 HONORABLE SARAH DUNCAN: Yeah. That's part
21 of Justice Hecht's letter.

22 CHAIRMAN BABCOCK: Which letter is that?

23 MR. HUGHES: I think it was the February.
24 It was either February or March.

25 HONORABLE SARAH DUNCAN: From my

1 perspective, I have not perceived that there was a problem
2 with strangers to the case going into a court and looking
3 at the court's paper file to find out the names of these
4 children. It's certainly possible, and with our work on
5 the internet, the dumping of all of these case files onto
6 the internet, it's going to be more and more possible.

7 MR. LOW: Sarah, did we discuss that when we
8 were sometime back discussing a sheet of confidential
9 information? Was that one of the things? I know it was
10 driver's license, Social Security, and did we discuss
11 children's names in connection with that?

12 HONORABLE SARAH DUNCAN: We did in the
13 context of the dumping of the files onto the internet.

14 MR. LOW: Right. So --

15 HONORABLE SARAH DUNCAN: The public access.
16 I remember Bonnie raising it, I believe, in one of our
17 marathon conference calls, and maybe that's why I was
18 thinking we were just talking about opinions. I don't
19 know. But --

20 MR. LOW: I think we did, but what we did
21 was -- the sheet was called confidential information
22 sheet.

23 CHAIRMAN BABCOCK: Sensitive information.
24 That's the electronic access rules.

25 MR. LOW: Was it?

1 HONORABLE SARAH DUNCAN: Right.

2 CHAIRMAN BABCOCK: We talked about that a
3 lot. This rule, though --

4 HONORABLE SARAH DUNCAN: Jody is shaking his
5 head, which worries me.

6 MR. HUGHES: Well, I think it's the -- go
7 ahead.

8 CHAIRMAN BABCOCK: This rule, which I've now
9 located, was part of the February 5th, 2007, referral. It
10 was not on the agenda today for some reason. Jody, was
11 it --

12 MR. HUGHES: It wasn't because, as Sarah
13 said, Bill had asked me to do up a draft on it. I did a
14 draft, sent it to him, and I don't think he liked it, and
15 so -- and his comment to me -- and he may have had other
16 concerns, too -- was there wasn't -- I couldn't find a
17 place to put it under one single rule, and so I tried to
18 put it under each, under 38 for courts of appeals, for the
19 briefs under 53, for the Supreme Court under Rule 52 for
20 original proceedings, and they all kind of looked the
21 same.

22 And I agree it's awkward to do it in
23 different places. I just couldn't -- looking through the
24 index, couldn't find a single place where there was an
25 empty rule vacancy, particularly in the general rules at

1 the beginning, to say any time you mention minors' names
2 you need to put their initials. And then I started
3 wondering, well, if the parents' names are known and the
4 kids are LBN and ABC, it's not going to be too hard to
5 figure out who they are anyway to the extent anybody
6 cares, but --

7 CHAIRMAN BABCOCK: Yeah. I mean, you can
8 find out some of these kids like that if you want to.

9 MR. HUGHES: Particularly when the parents'
10 last name is in the --

11 CHAIRMAN BABCOCK: Exactly.

12 HONORABLE STEPHEN YELENOSKY: If the last
13 name is something like Yelenosky, not going to be too many
14 of those.

15 CHAIRMAN BABCOCK: Sarah, we can talk about
16 it some more. Do you think --

17 HONORABLE SARAH DUNCAN: Well, just a straw
18 vote. Do people want to propose a rule that encompasses
19 all phases of the proceeding; and that would be a series,
20 I think, at least a series of rules between the Rules of
21 Civil Procedure and the Rules of Appellate Procedure? Do
22 you want to restrict it to the Rules of Appellate
23 Procedure; and if so, do you want it just to cover
24 opinions or do you want it to cover anything that's filed
25 in the appellate court?

1 I mean, I think what Bill is struggling with
2 is this could pervade the entire judicial process. Isn't
3 that your feeling?

4 MR. HUGHES: And that was I guess one reason
5 at least doing it at the appellate level may not address
6 the full problem, but it's easier in the sense that if you
7 do it at the trial level you're really restricting what
8 people are actually filing, which kind of goes more to the
9 sensitive data rule, which may eventually -- you know,
10 that could be part of that, but --

11 CHAIRMAN BABCOCK: The letter from Justice
12 Hecht says --

13 MR. LOW: There is no Family Code provision
14 dealing with it?

15 HONORABLE SARAH DUNCAN: There is a Family
16 Code provision, if I remember correctly, that expresses --
17 I'm looking at Terry and David and Jane and Jan. Isn't
18 there a Family Code provision that expresses a preference
19 for using initials?

20 HONORABLE JAN PATTERSON: There is.

21 HONORABLE SARAH DUNCAN: I tried to follow
22 it, but I know there are a lot of opinions that doesn't.

23 HONORABLE JAN PATTERSON: There is, and it's
24 not going to come to me right now. I think we've got two
25 categories of topics. One is the whole sensitive data,

1 which opens up kind of data search files and court files
2 and all that, which is very difficult and something that I
3 think is much simpler, and that is our request to avoid
4 these being searchable on any computer like Lexis. And so
5 to the extent victims of crimes or children can be
6 referred to by initial -- and Jody's right, to some extent
7 you're going to know who they are, but they're still not
8 necessarily searchable, and it is protection of some
9 degree, so I think that's a more limited issue and is
10 easier to deal with.

11 HONORABLE SARAH DUNCAN: So you're
12 suggesting that we just do an opinion rule, put it in the
13 opinion rule?

14 HONORABLE JAN PATTERSON: I think initially
15 we were talking about an opinion rule just so that we
16 don't contribute to the naming of these people on
17 worldwide computer information, which is what Lexis and
18 Westlaw do. I think that's a -- an initial concern and a
19 big one, I think, a significant one.

20 CHAIRMAN BABCOCK: Yeah, just reading this
21 synopsis of the issue, it's a pretty big issue. I
22 wouldn't feel qualified to vote right now without talking
23 about it.

24 HONORABLE JAN PATTERSON: It is a big issue.

25 CHAIRMAN BABCOCK: So why don't we put it on

1 the agenda for next time? But, Sarah, anybody else want
2 to talk about any more right now?

3 MR. JACKSON: Are we going even as far as
4 the reporter's record?

5 CHAIRMAN BABCOCK: That's not what this
6 charge had to do. Do with, I should say.

7 HONORABLE SARAH DUNCAN: So you're saying
8 you don't even want to do a straw vote on whether it's
9 going to be limited to the opinion, as Justice Patterson
10 says, or whether it's going to extend throughout some part
11 of the process?

12 CHAIRMAN BABCOCK: Well, Justice Hecht asked
13 us to look at whether the appellate rules should include a
14 provision that requires parties in parental rights
15 termination cases to identify minor children only by their
16 initials, and that would allow courts to strike any
17 appendices or exhibits containing minors' names, so that
18 strikes me as broader than opinions.

19 HONORABLE SARAH DUNCAN: Yeah. Me, too.
20 Sorry.

21 HONORABLE NATHAN HECHT: And it overlaps the
22 sensitive data rule, the Rule 15, which we haven't decided
23 whether to make minors' names sensitive data or not, and
24 the inclination is to do so, but still not sure what
25 effect that has on all these different kinds of cases.

1 MR. JACKSON: Didn't we have a little bit of
2 this debate in the parental notification rule?

3 CHAIRMAN BABCOCK: Well, yeah, but we were
4 hamstrung there by the Legislature --

5 MR. JACKSON: Right.

6 CHAIRMAN BABCOCK: -- which voted to not
7 permit anybody's names, including the judge who decided
8 the case to be released, which I had a problem with, but
9 the Legislature got elected, and I didn't. Yeah, Sarah.

10 HONORABLE SARAH DUNCAN: Did we adopt a
11 sealing rule for the appellate courts?

12 HONORABLE STEPHEN YELENOSKY: What?

13 HONORABLE SARAH DUNCAN: I know we worked on
14 one, but did we adopt it?

15 CHAIRMAN BABCOCK: No. No, I don't think
16 so.

17 MR. HUGHES: That was actually referred
18 recently, also.

19 CHAIRMAN BABCOCK: Yeah. Okay. Anything
20 else? Sarah?

21 HONORABLE SARAH DUNCAN: Not from me, not
22 from us.

23 CHAIRMAN BABCOCK: So your prediction of 20
24 to 30 minutes --

25 HONORABLE SARAH DUNCAN: Fell by the

1 wayside, huh?

2 CHAIRMAN BABCOCK: All right. Now, let's go
3 to Gilstrap and Judge Lawrence.

4 MR. GILSTRAP: All right. Once upon a time
5 all writs, processes, citations, and the such were served
6 by the sheriff or constable, and there was a lot of
7 statutory law back before the rules were adopted that
8 incorporated this and expressly referenced the sheriff or
9 constable. This language was all brought forward into the
10 rules back when they were adopted in 1941, particularly
11 back in part six, which deals with ancillary proceeding.
12 It shot through with reference to the sheriff or constable
13 serving writs and that type of thing.

14 In the first part of the rules this appeared
15 in two places. Rule 103 said, "Citation and other notices
16 may be served anywhere by any sheriff or constable," dealt
17 with citation and notices, and then Rule 15 said -- dealt
18 with all writs and processes and it said that "unless
19 otherwise specially provided by the law or these rules,
20 every such writ and process shall be directed to any
21 sheriff and any constable" and then other rules said the
22 sheriff and constable should serve it.

23 Then in the 1980's we began to see private
24 process servers, and there was a long battle there. I'm
25 going to go back and read a case that Bill Dorsaneo came

1 up with, Lawyers Civil Process, Inc. against Vines, 690
2 S.W.2d 939. That will give you some of the background,
3 and so in 1988 Rule 103 was amended, and it said,
4 "citation and other notices shall be served by any sheriff
5 or constable" and then it said, "or a person appointed by
6 court order." So we began to see the process of having
7 private process servers appointed by the court. You would
8 go down, you would get your order to the court, "I want
9 this served privately." The judge would sign it. You
10 would have a process server sign it.

11 Then this got to be a business, and there
12 was activity in the Legislature, a certain turf war
13 between the private process servers and sheriffs or
14 constables, still going on; and in 2005 the rule, Rule
15 103, was amended by the Court after this committee
16 discussed it; and it presently reads "process, including
17 citation and other notices, writs, orders, and other
18 papers, shall be served by any person authorized by law or
19 any person certified by the Supreme Court" under the new
20 program that was installed at that time, and it had an
21 exception. "Unless otherwise authorized by written court
22 order, only a sheriff or constable may serve a citation in
23 an action of forcible entry and detainer; a writ that
24 requires the actual taking of possession of a person,
25 property, or thing; or process requiring that an

1 enforcement action be physically enforced by the person
2 delivering the process." This was important because it --
3 the amendment to Rule 103 was important because it allowed
4 the service of writs.

5 Now, basically if you'll recall, a writ is
6 something more than notice. A writ is an order of the
7 court, and there is basically two types of writs. One
8 type of writ we're all familiar with was where you tell
9 the sheriff to go out and seize property, like a
10 sequestration or an attachment, but there is other types
11 of writs like an injunction or a garnishment that when
12 served upon the recipient direct the person not to do
13 something. When a bank is garnished, it is directed not
14 to let the funds go, so it is under a court order, so
15 that's kind of an important distinction, but clearly the
16 call was made back in '05 that all writs and orders and
17 citations could be served, except in these cases that were
18 carved out.

19 Now, more recently, apparently a controversy
20 has arisen over the writ of garnishment. The writ of
21 garnishment is clearly a writ within Rule 103, but it
22 doesn't require the taking of property. It just requires
23 a person not to let go of the property, and I just learned
24 that writ of garnishment is used for something more than
25 money. It can be used to garnish property. Again, the

1 recipient of the writ of garnishment can't let the
2 property go, although in almost all cases it's used merely
3 to trap money. So a proposal came and, as I understand,
4 it originated with a query from Carl Weeks with the
5 private process servers about whether or not the writ of
6 garnishment could be served by a private process server.

7 Now, remember, in garnishment there is a
8 twofold procedure. First of all, you have the writ issue,
9 and it's served on the bank, and that traps the money.
10 Then you have citation issued, and it's served on the
11 debtor, and if you're the creditor, you want to have the
12 bank served first obviously so the debtor won't go jerk
13 the money out of the bank. That question arose, and it
14 was sent to the subcommittee that deals with Rule 103,
15 which Richard heads, and we conferred with it, I think
16 mainly by e-mail. We didn't have a big turnout. Richard
17 is having a seminar. He asked me to present this. It
18 didn't seem like a controversial item, and basically
19 everyone kind of said, "Well, gee, I mean, there's no
20 process being -- there is no property being seized, it's a
21 simple matter, let's go ahead and report it on favorably
22 to the full committee," and he asked me to do it.

23 I started thinking, I said, you know, this
24 really falls within the bailiwick -- could fall within the
25 bailiwick of Judge Lawrence because he deals with part

1 six, which deals with all the writs, attachment, that type
2 thing, garnishment. So I kicked it over to him. He then
3 I think circulated it and got some response from the
4 constables. There is a very interesting exchange in here
5 between Carl Weeks and Ron Hickman, and you can read that.
6 There are some issues involved that I wasn't
7 understanding, and I think Judge Lawrence can help us on
8 this.

9 However, my feeling is -- and again, we
10 didn't have a large turnout on this, my feeling is if we
11 change this I don't know that we should do it merely by
12 amending Rule 103 to say, hey, this includes garnishments,
13 too. There's just -- there's just so much language back
14 in the garnishment rules that expressly speaks to the
15 sheriff or constable that we probably need to change that
16 language; and, yes, it does raise the question of do you
17 change the language involving an eviction or the language
18 involving an injunction; but there are problems here. All
19 of the rules, 66 -- let's see, I think it's 661, 662, 663,
20 and 664 talk about the sheriff or constable levying the
21 writ of garnishment; and so I think we need to decide,
22 first of all, if we want to make it clear that a private
23 process server can serve or execute a writ of garnishment,
24 as it's called in the rules; and secondly, to do that, do
25 we just want to -- if we want to do something, do we

1 simply want to tinker with Rule 103 or do we want to go in
2 and try to address the garnishment rules? And with that I
3 think I'll pass it on to Tom Lawrence because that's his
4 bailiwick.

5 CHAIRMAN BABCOCK: Gotcha. Thanks, Frank.

6 HONORABLE TOM LAWRENCE: Well, the threshold
7 issue under 103 -- and when I say 103 I also mean Rule
8 536, 536 being the service rule for the justice courts,
9 but the rules are written identically. The threshold is
10 whether or not the writ will require the actual taking of
11 possession of a person, property, or thing. If it does
12 require it, then a private process server under 103 would
13 not be able to serve it. If it does not then presumably
14 they could, but that's not the only rule you have to look
15 at, because we've got a lot of other rules, and I really
16 want to -- I think we need to discuss this in the context
17 of some of the other writs because it's not just the
18 garnishment issue. There's more to it than that, I think.

19 There's three categories. One is what can a
20 private process server serve, and that clearly is
21 citations, other notices, orders, and other papers.
22 Second category is what can a process server not serve.
23 Evictions, that's clearly excluded in 103; writs of
24 attachment, sequestration, and execution, because those do
25 require the immediate taking of persons or property; and

1 writs of possession, which are really not within our
2 bailiwick because a writ of possession, which is the writ
3 that's issued to physically evict somebody, is actually in
4 the Texas Property Code, and the Legislature has already
5 decided that an officer or sheriff or constable needs to
6 serve that.

7 Now, what is unclear, perhaps, is writs of
8 garnishment or injunction. No immediate taking of
9 property or person, but in a garnishment the bank account
10 is frozen; and after the trial if it's found that the
11 judgment debtor is the person that owns that account then
12 it is going to be taken; and an injunction, of course,
13 doesn't lead to anything immediate, but one of the next
14 steps could be contempt of the person. Citation and
15 eviction, although 103 requires a sheriff or constable to
16 serve that, it really is not a citation that requires the
17 immediate taking of a person, property, or a thing. So if
18 you look at the broad threshold, the bright line between
19 what a private process server can and can't serve, then
20 you would presume that a private process server could
21 serve an eviction, citation, not the writ of possession.
22 We have that as clearly excluded in the rule for whatever
23 the reason the Court did that.

24 The letter from Justice Hecht references an
25 inquiry from Carl Weeks, who is a private process server,

1 and asking really why a private process server can't serve
2 garnishment since it doesn't require the immediate taking.
3 Well, 103 would presume to allow it, but then you've got
4 Rule 15, and Rule 15 says that "all writs of process shall
5 be directed to any sheriff and constable." Then the
6 specific garnishment rules -- and correct me if I'm wrong,
7 but it's always been my impression that if you have a
8 specific rule that applies to something, that that would
9 generally take precedence over some general rule. Is that
10 -- I've always understood that to be the rule, so Rule 662
11 in the garnishment rules -- and there are two different
12 things that are served. One is the writ of garnishment
13 itself which is served on the bank, and the other is the
14 notice of the writ, the citation, which is served on the
15 defendant.

16 Now, under the current rules, the citation
17 actually can be served -- and that's Rule 663a, "The
18 defendant shall be served in any manner prescribed for
19 service of citation or as provided in Rule 21a." So
20 presumably the citation of garnishment could be served by
21 a private process server, but Rule 662 says that "the writ
22 of garnishment shall be dated and may be delivered to the
23 sheriff or constable by the officer who issued it." Rule
24 663 says that "the sheriff or constable receiving the writ
25 of garnishment shall immediately proceed to execute." So

1 there is clear language in the garnishment rules
2 themselves that talk in terms of sheriff or constable.

3 There also could be a question as to -- I
4 guess if you consider that a garnishment is not the
5 immediate taking of property, and if that's the
6 justification or termination then I guess you would say
7 that a garnishment could be served by a process server,
8 but I think you would have to change the other rules in
9 the garnishment section. If you consider that while it's
10 not an immediate taking, it's certainly something that's
11 going to happen pretty quick, as soon as it's determined
12 that the bank account is owned by the -- and you may
13 decide that it is -- if not an immediate taking it's
14 something that's going to be taken.

15 So the question is which rule prevails? Is
16 it Rule 15, which says that all writs are directed to the
17 sheriff and constable? Is it Rule 103, which we've talked
18 about? 662 and 663, which say only sheriff or constable?
19 Carl Weeks' response, he sent an e-mail to Jody, and his
20 response is that he considered Rule 663 to be archaic, and
21 therefore, basically it should not be given any credence
22 because 103 would have done away with that. God knows if
23 we're going to do away with all the archaic rules that
24 we've got we've got a lot to look at, but that was his
25 theory on that.

1 The rules can be written really to
2 accomplish either result. It's a very simple fix. It's
3 just a matter of policy as to what you want to do. Carl
4 Weeks also cited a case, and there really haven't been any
5 cases on this issue. All the cases that talk about who
6 serves garnishment that I've been able to find or anybody
7 has mentioned are before the change in the rules in 205,
8 they all clearly say the sheriff or constable serves the
9 garnishment. There are no dissents on that that I ever
10 saw, but there was a case out of a County Court at Law No.
11 4 in Dallas, and in that County Court at Law case it was a
12 garnishment case, and that County Court at Law judge said
13 that a private process server could serve a garnishment
14 and cited two things. One, the change in Rule 103, and
15 the justification was that it was not an immediate taking
16 of property, and, two, cited the ultimate authority of the
17 deliberations of this committee and went back and enclosed
18 a transcript where he says that in January of 2005 when we
19 discussed this at some length that we declined to remove
20 the writs.

21 Well, I went back and read word for word
22 that, and that's not what it says at all. In fact,
23 generally the comments say that we should remove the writs
24 from 103, but we didn't take a vote on that, and so --

25 HONORABLE STEPHEN YELENOSKY: And since when

1 is anything we say here authoritative?

2 HONORABLE TOM LAWRENCE: Well, I mean, I was
3 impressed that our statements were even cited. And
4 injunction presents a similar issue. Although the private
5 process servers are not today asking that they be able to
6 serve injunctions, you really have the same conflict. An
7 injunction is not something that's going to result in an
8 immediate taking of person, property, or thing. You've
9 got the conflict between Rule 15 and 103. Rule 686 says,
10 "The citation shall be served and returned in like manner
11 as ordinary citations issued from said court," so
12 presumably a process server could serve that. 688 says,
13 "The clerk shall issue the TRO or temporary injunction and
14 deliver the same to sheriff or constable." 689 says, "The
15 officer receiving the writ shall execute and return it to
16 the court."

17 Again, it's a policy question. We don't
18 really have to decide that, but if the logical distinction
19 is the immediate taking then that's something that
20 logically we would want to address. Now, the service of
21 citation in an eviction, again, doesn't necessitate the
22 immediate taking. Nothing happens. It's just a citation
23 in a lawsuit. It's an eviction, which has expedited time
24 schedules. A few years ago when we looked at the eviction
25 rules and we sent up to the Court some proposals to change

1 the eviction rules, this was one of the things that the
2 committee recommended, is that private process servers be
3 allowed to serve evictions. The Court hasn't acted on
4 that and, of course, 103 specifically excludes it, but it
5 may be something that we would want to talk about.

6 HONORABLE STEPHEN YELENOSKY: Didn't you say
7 that was by statute, though, the citation?

8 HONORABLE TOM LAWRENCE: No, the citation is
9 under the rules. The writ of possession for the move out
10 is by statute under the Property Code.

11 And there's another -- another issue that we
12 may want to address even, if we don't do anything about
13 the question of garnishment, and that is the conflicts
14 with the particular rules and the language. You've got
15 the obvious conflict with Rule 15 and 103. You've also
16 got in part six, which of the service rules for
17 garnishment, attachment, sequestration, injunctions,
18 exclusions, trial over right of property, you've got the
19 term "sheriff and constable" used interchangeably with the
20 term "officer." Now, sheriff and constable is pretty
21 easy. I don't think there is much discussion about what
22 that means, but an "officer" certainly has broader
23 implications. That could be a municipal officer, police
24 officer, DPS trooper, Texas Ranger. There are a lot of
25 people that are considered officers that may not be

1 sheriff or constable. So do we want to go back and try to
2 clean up some of that language?

3 In the service rules for executions and
4 trials over the right of property, the term "officer" is
5 used, but not "sheriff or constable." In distress
6 warrants "sheriff and constable" is used but not
7 "officers," and in some, like garnishments, both are used.
8 So we're all over the gamut in the terminology we use as
9 to who can serve these, and then last, if we want to
10 recommend that private process servers be able to serve
11 garnishments and then by implication maybe some of the
12 other things, I guess the question is how -- who do you
13 want serving that? Do you want a certified process
14 server, or do you want somebody that is under part two,
15 which is anybody 18 years or older who the court simply
16 appoints to do it? It could be anyone.

17 One consideration may be that you might want
18 to create a different class of certified process servers,
19 somebody that has some special endorsement that has
20 received some special training, to the extent that you
21 feel they may need special training for a writ of
22 garnishment, that would then allow them to have an
23 endorsement or some type of special certification for
24 serving these special processes, and then only those could
25 serve it. So that's kind of where we stand. It's really

1 a policy matter. It can be drafted flat or it can be
2 drafted round. It's just how we want to do it.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: Chip, I noticed that the
5 garnishment rules all came from civil statutes which were
6 repealed. Were they repealed by the Property Code or by
7 something else that still exists, or were they repealed by
8 these rules? Because if they were repealed by a statute,
9 they're still in existence. Then, you know, we've got to
10 deal with that. Do you know?

11 HONORABLE TOM LAWRENCE: I don't know the
12 answer to that.

13 MR. LOW: Because every one of these rules
14 came from in the forties, like 40, 29. And, secondly, are
15 there any constitutional provisions pertaining to any
16 garnishment or any of these things?

17 HONORABLE TOM LAWRENCE: Not that I know of.

18 MR. LOW: Okay. I don't know, but I know a
19 lot of times I find things in the constitution that I'm
20 surprised, but I get surprised pretty often.

21 The other thing is, are you saying that
22 really first we need to consider whether or not to add the
23 private process servers and, secondly, to clean up
24 language so it's consistent to officer, sheriff, and all
25 that? That's basically what you're saying?

1 HONORABLE TOM LAWRENCE: Well, I'm not
2 suggesting that we add them or not.

3 MR. LOW: No, no, no. I'm not saying you're
4 suggesting anything. I'm suggesting those are the
5 questions that are raised.

6 HONORABLE TOM LAWRENCE: The immediate
7 question is garnishment. If you consider garnishment, you
8 may want to also consider writ of injunction and then you
9 may also want to consider citation and eviction, if you
10 want to look at that, but if you don't do anything, I
11 think we ought to go in and clean up this language where
12 it talks about who can do the service so it's a little
13 clearer and remove all these conflicts between the rules.

14 CHAIRMAN BABCOCK: Carl Hamilton.

15 MR. HAMILTON: One other consideration on
16 Rule 664. 664 says that the officer who serves the writ
17 of garnishment has to approve the replevy bond, and I'm
18 not sure that that approval of the bond is something that
19 ought to be limited to constables or sheriff or whether
20 process servers ought to be allowed also to approve the
21 bonds.

22 HONORABLE TOM LAWRENCE: Constable Hickman's
23 memo referenced that, and I looked at that, and I know it
24 says "officer," but as a practical matter -- and other
25 judges that do these, but I think almost always these

1 replevy bonds go back to the court that issues the writ of
2 garnishment. I've not ever seen an officer actually do
3 that, but that is clearly what the rule says.

4 One of the other things that the constables
5 point out is that the constables, if something is done
6 wrong and there is some liability on the part of who
7 serves it, that the constables have a bond and they're
8 employed by the county, so there would be someone to look
9 at in that regard, and they argue that that wouldn't
10 necessarily be the case with a process server.

11 CHAIRMAN BABCOCK: Well -- yeah, Frank.

12 MR. GILSTRAP: You know, I think those are
13 pretty much the issues. On what Carl said, I'm a little
14 concerned about, you know, the notion that a private
15 person could approve the bond, but again, maybe we could
16 just simply solve that by saying that, in fact, the court
17 should approve the bond. I mean, there's a lot of ways to
18 fix this; but I think the way to proceed is, you know,
19 question A, do we want to allow private process servers to
20 serve the writ of garnishment; and then, B, if so, how do
21 we fix it? Do we try to go in and merely tinker with 103,
22 or do we have Tom and his group, subcommittee, go in and
23 try to do a more global fix involving starting with the
24 garnishment rules?

25 CHAIRMAN BABCOCK: When we worked on 103 and

1 536, maybe Judge Lawrence knows the answer to this, we
2 allowed private process servers to serve writs. I mean,
3 that's right in the rule, right?

4 MR. GILSTRAP: Yes.

5 HONORABLE TOM LAWRENCE: Well, as I recall,
6 and Justice Hecht can correct my faulty memory, but I
7 don't remember that we talked about writs when we first
8 sent it up. That was something that was added to it that
9 we talked about in January of '05, as I recall.

10 HONORABLE STEPHEN YELENOSKY: You mean writs
11 generally? Don't you have to specify which?

12 HONORABLE TOM LAWRENCE: I don't think writs
13 was in the rule that we sent up.

14 CHAIRMAN BABCOCK: Okay. Well, Rule 103
15 says -- and the same language is in 536, says, "process
16 including citations and other notices, writs, orders, and
17 other papers issued by the court may be served anywhere"
18 and then it goes on, and then later in the rule it
19 excludes private process servers serving writs -- I just
20 lost my place, but requiring immediate possession of
21 property basically.

22 HONORABLE STEPHEN YELENOSKY: And some writs
23 do.

24 CHAIRMAN BABCOCK: I know.

25 MR. GILSTRAP: I don't think we approved

1 that language. I think the Court added that language.
2 You know, I think we discussed it. I don't know that we
3 ever really approved it, but it's clear that 103 does
4 include writs.

5 CHAIRMAN BABCOCK: Yeah.

6 MR. GILSTRAP: And it can include the writ
7 of garnishment. The problem is that what you're relying
8 on is this carve-out language in 103 to kind of prevent
9 you from getting in trouble, but when you start applying
10 it to specific cases it's kind of vague, and I think we
11 might be pushing the limits here on garnishment, you know,
12 but maybe we do need to tinker with the garnishment rules
13 and not say, well -- because look at Rule 15. It says --
14 it says that unless -- that "every writ and process shall
15 be served by the constable unless otherwise specially
16 provided by these laws or these rules."

17 Well, what we've got is an exception here
18 that's kind of swallowed up all the rest of the Rules of
19 Civil Procedure, and that might be a short-term fix, but I
20 don't think it's a long-term fix.

21 CHAIRMAN BABCOCK: Well, Rule 103, and I
22 think the same language is in 53, the language I was
23 searching for says, "Only a sheriff or constable may serve
24 a citation in an action of FED, a writ that requires" --
25 "and a writ that requires the actual taking of possession

1 of a person, property, or thing." So they give private
2 process servers the right to serve writs but then take it
3 away in certain circumstances. And my point is, was this
4 oversight or did the Court intend that private process
5 servers have the right to serve such things as writs of
6 garnishment, which we all agree wouldn't fall within this
7 exception, because it doesn't require the actual taking of
8 possession of a person, property, or thing?

9 MR. GILSTRAP: If you find the intent of the
10 Court and the language of the rule, I think they did. I
11 think they did intend to include a lot of private process
12 servers to serve writs of garnishment, but apparently it's
13 unclear enough that a lot of people are having problems
14 with it.

15 CHAIRMAN BABCOCK: And here's where I'm
16 going on this. If Rule 103 and 536 -- and this is what
17 I'm not clear about, but that was amended specifically
18 with private process servers in mind more recently than
19 these other rules, like 663, which would seem to not allow
20 private process servers to do it. Fair enough?

21 HONORABLE TOM LAWRENCE: I believe that's
22 correct.

23 CHAIRMAN BABCOCK: Okay. So the question, I
24 guess we can either ask the Court or we can fumble along
25 in the dark.

1 MR. GILSTRAP: Maybe some court somewhere
2 will decide it, you know.

3 CHAIRMAN BABCOCK: I mean, it could be an
4 issue for a court to decide, but is the thought that we
5 should try to harmonize rules like 663, 664, et cetera,
6 with 103, 536, or should we make a policy decision on,
7 whoa, that was a bad idea what you guys did to begin with?

8 HONORABLE NATHAN HECHT: Well, the rule I
9 think as we published it did not have the exception to it,
10 and it had just writs. There was no exception in 103
11 about this; is that right?

12 MR. HUGHES: This predated me.

13 HONORABLE NATHAN HECHT: Okay. And so then
14 there was public comment, and it was suggested by I think
15 some -- I think maybe from Harris County someplace, but I
16 may be vague on this, that that exception was a good one
17 because if you're seizing property and people, there's
18 more chance of altercation or some problem that may better
19 be handled by a law enforcement officer rather than a
20 process server, a private person; and so the language, the
21 exception language, was suggested; and I think we thought
22 it was good and we told -- I believe I reported to the
23 committee that we were going to do that; and I think that
24 was probably the January meeting because it was shortly
25 after that that we did it or that we indicated we were

1 going to do it; and that's what we did. So -- but if
2 there's questions now about all these other rules then we
3 probably ought to try to clear it up.

4 CHAIRMAN BABCOCK: Yeah. But how do we
5 clear it up? We could clear it up by taking writs out of
6 103 and 536. That would be one way to clear it up, and
7 the other way to clear it up would be to harmonize 663 and
8 664 and these writ of garnishment rules to say, "Oh, by
9 the way, it could be a private process server."

10 HONORABLE NATHAN HECHT: Well, we started
11 from the position that they could serve all writs, and
12 then -- so I think when we published that rule we were
13 thinking that that meant everything. Anything that
14 required service could be served by a private process
15 server, and then the comment to that was, well, but maybe
16 not these things.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE NATHAN HECHT: And so I think the
19 presumption, subject to being informed, that this is not
20 working or it's not going to work, is that it still means
21 all the other writs except these, and it seems to me
22 ultimately clear that writ of garnishment does not fall
23 within that exception, so -- but if we've got all these
24 other rules that say these things then it seems to me we
25 should make them consistent with 103.

1 CHAIRMAN BABCOCK: Yeah. David Jackson.

2 MR. JACKSON: Well, the thing that scares me
3 is will that let you carry all the way to 706, the
4 disposition of property by the officer, which would be the
5 process server disposing of the property? That could
6 create some big problems if you let it slide all that way.

7 CHAIRMAN BABCOCK: Well, service of writ of
8 a garnishment doesn't --

9 MR. JACKSON: Well, 706 allows for a court
10 to let the officer dispose of the property.

11 HONORABLE TOM LAWRENCE: That's
12 sequestration.

13 CHAIRMAN BABCOCK: That's not garnishment.
14 That's sequestration, which is different, I think, isn't
15 it?

16 HONORABLE TOM LAWRENCE: Yeah.

17 HONORABLE NATHAN HECHT: Yeah.

18 CHAIRMAN BABCOCK: So that wouldn't be a
19 problem, would it?

20 HONORABLE NATHAN HECHT: Huh-uh, shouldn't.

21 HONORABLE TOM LAWRENCE: Well, as long as
22 you assume that a sequestration is the immediate taking of
23 property, therefore, a private process server can't do
24 it --

25 CHAIRMAN BABCOCK: Wouldn't do that, right.

1 HONORABLE TOM LAWRENCE: -- there's not an
2 issue.

3 CHAIRMAN BABCOCK: Yeah, Frank.

4 MR. GILSTRAP: I think the Court's basic
5 approach when it adopted Rule 103 was sound, and that
6 is -- you know, an extreme case, you know, if you're going
7 to seize property, if you're going to do something that
8 involves more than handing someone a piece of paper, you
9 want the guy with a badge, you don't want Dog the Bounty
10 Hunter doing that. And so, I know they're not like that,
11 but just an extreme example. Well, that's the type of
12 case that could arise. That's the type of case where you
13 have people seizing people's property and they don't have
14 a badge on. So I think the basic approach is fine, and I
15 think that, you know, I was straining real hard to find
16 some situation involving a writ of garnishment that would
17 be more than that, and there are a couple of bothersome
18 things.

19 I mean, you know, it does tell the person
20 you can't do anything with the property, you know, again,
21 and it does apply to more than money. There is this
22 business about the replevy, but I think we can clean that
23 up. So I think in general I think consistent with the
24 approach that the Court took, which was a sound one, we
25 could go ahead and include garnishments in this. That's

1 where the need is. So my suggestion would be let's go
2 ahead and simply tell Judge Lawrence's committee to try to
3 fix garnishment.

4 CHAIRMAN BABCOCK: That was clever, moving
5 it from your committee to their committee.

6 HONORABLE TOM LAWRENCE: Sneaky.

7 MR. GILSTRAP: And, you know, rather than
8 say, "Well, this is how we interpret Rule 103, you guys
9 should know this," and that strikes me as a sound
10 approach, and that's where the demand is. We can fix
11 garnishment and then if something else comes up we will at
12 least have a track record here, but it seems to me that
13 works.

14 CHAIRMAN BABCOCK: How do you feel? Go
15 ahead, Judge.

16 HONORABLE NATHAN HECHT: And the other thing
17 is there is even an exception to the exception because it
18 was pointed out, well, but there may be times, even though
19 immediate detention of a person or property is required,
20 that you really need a private person to do it because you
21 can't find them and they're hiding and running off and so
22 it's going to be hard to get the officer to dog them until
23 they get really, you know -- until they get it served. So
24 there's even an exception to the exception, so I think the
25 idea was pretty clear that private process servers ought

1 to be able to serve all this stuff.

2 CHAIRMAN BABCOCK: Judge Lawrence, are you
3 okay with that?

4 HONORABLE TOM LAWRENCE: Well, clarify this.
5 So you want us to draft it so that private process servers
6 can serve garnishments?

7 HONORABLE NATHAN HECHT: Well, yes, but I
8 think while you're looking at it you might see if there is
9 other problems that are going to come up, so that we don't
10 get these dribbled out over the next ten years.

11 HONORABLE TOM LAWRENCE: What do you want to
12 do about 664 that talks about a replevy bond being filed
13 by the -- being filed with the officer? You just want to
14 change that to "court"? That would fix the problem.

15 HONORABLE NATHAN HECHT: Yeah.

16 HONORABLE TOM LAWRENCE: Do district courts
17 have any problem with that?

18 MS. WOLBRUECK: I doubt it. The district
19 judges want to be able to deal with replevying a bond.

20 CHAIRMAN BABCOCK: Right. And so I guess
21 for the -- I don't know if you can do it by the next
22 meeting, but maybe suggest some language for whatever
23 rules are affected to harmonize the thing so that we don't
24 have an inconsistency in the rule.

25 HONORABLE TOM LAWRENCE: What about

1 injunctions?

2 HONORABLE NATHAN HECHT: Well, I think the
3 same thing. I mean, I think the Court so far is -- has
4 endorsed the language that's in 103. I think that should
5 be the test, unless the committee thinks that that's not a
6 good test going forward. But for now I think that's the
7 test we should work with. But, of course, you know, it's
8 important to make this as clear as possible because you
9 don't want somebody arguing that garnishment wasn't
10 effective because the person that served it didn't have
11 the authority to do it, or anything else for that matter,
12 so it's better to have this absolutely clear than murky.

13 HONORABLE TOM LAWRENCE: And Rule 15, you
14 want to expand that so it's not just sheriff or constable?

15 HONORABLE NATHAN HECHT: Well, I think we
16 should think about that, yes. I think we should think
17 about adding something to 15 that says, you know, "or
18 other person authorized by these rules" or "law" or
19 something.

20 MR. GILSTRAP: I think --

21 HONORABLE TOM LAWRENCE: My last question is
22 the term "officer," which is used so often in these rules,
23 that is more or less synonymous with sheriff or constable,
24 is there a reason we need the word "officer," or can we
25 just say "sheriff or constable or other authorized

1 person"?

2 HONORABLE NATHAN HECHT: I just don't know
3 enough. We would just have to look at the context.

4 CHAIRMAN BABCOCK: Yeah, I would be careful
5 about that.

6 HONORABLE NATHAN HECHT: Yeah, I just don't
7 know.

8 CHAIRMAN BABCOCK: "Sheriff" may be a
9 defined term under the statutes and might only mean the
10 elected sheriff, whereas one of his deputies would be an
11 officer. Carl.

12 MR. HAMILTON: What about the eviction
13 notice? That's sort of like a garnishment or an
14 injunction. It doesn't seize properties. It's just like
15 a citation, but yet in 103 we've excepted eviction
16 notices.

17 HONORABLE NATHAN HECHT: Again, I don't
18 recall why we did that.

19 CHAIRMAN BABCOCK: Let's not go looking for
20 problems.

21 MR. GILSTRAP: Well, I think there's --

22 HONORABLE STEPHEN YELENOSKY: There's a
23 reason you won't find in anything written, from my
24 experience at Legal Aid, which is people getting evicted
25 often don't know what they're getting. They get notices

1 of eviction, et cetera, and we would routinely tell them,
2 "Until you get something from a constable, you know, you
3 really haven't been sued," because they know the
4 difference between a constable and a private person, but
5 that's just the reality of the difficulty some of these
6 people have in understanding what's going on.

7 CHAIRMAN BABCOCK: Okay. I think we're good
8 on that. Why don't we take our afternoon break, but
9 before we do that, we've got two more items on the agenda.
10 Judge Christopher has got the first one, and Buddy has got
11 the second one, and I know Judge Christopher's will be
12 very short, I suspect. Well, Alex is not here, but
13 anyway, we're going to finish today. I don't think we're
14 going to need tomorrow for anybody that's making travel
15 plans. So let's take about a 10-minute break.

16 (Recess from 3:35 p.m. to 3:47 p.m.)

17 CHAIRMAN BABCOCK: Uh-oh, we've got a
18 Supreme Court justice amending his opening statement, so
19 everybody be sure to listen up to this.

20 HONORABLE NATHAN HECHT: I neglected to
21 point out in opening this morning --

22 CHAIRMAN BABCOCK: You're supplementing.

23 HONORABLE NATHAN HECHT: I'm supplementing.
24 That Justice Lawrence has been appointed to the State
25 Commission on Judicial Conduct.

1 (Applause)

2 HONORABLE NATHAN HECHT: Once again
3 demonstrating how membership on this committee is nothing
4 but a road to greatness.

5 CHAIRMAN BABCOCK: If you think about it,
6 look at it, you know, Brister now on the Supreme Court,
7 Jefferson, Pemberton. We don't know what's in store for
8 you, Jody, but -- Yelenosky.

9 HONORABLE NATHAN HECHT: Yeah.

10 CHAIRMAN BABCOCK: Okay. Judge Christopher,
11 all yours.

12 HONORABLE TRACY CHRISTOPHER: Okay.

13 CHAIRMAN BABCOCK: Don't sound so
14 enthusiastic about this.

15 HONORABLE TRACY CHRISTOPHER: Last meeting
16 Chip threw me onto this subcommittee with Alistair, which
17 came about from a letter written by David Beck asking us
18 to insert language into Rule 226a about the role of
19 lawyers. The purpose of the language was to try to
20 improve the reputation, status, et cetera, of the lawyers.
21 We've looked at two different drafts here in the
22 committee. We've sort of narrowly voted them down both
23 times, but we keep getting sent back to try another draft
24 again, which is how I got thrown to the committee.

25 So we have two different drafts for you to

1 look at, one which has absolutely nothing on it to
2 indicate what it is other than it starts out with "Those
3 who are selected as jurors in this case will resolve the
4 disputes between the parties" and one from the pattern
5 jury charge committee, which I've got a little comment
6 about that, because we're also looking at Rule 226a in an
7 attempt to make our instructions to the jury this plain
8 language, and I thought we were actually going to try to
9 present the entire project to the committee this week, but
10 apparently we didn't quite get there. So the long and the
11 short of it is what we're looking at right now I've
12 nicknamed the "lawyers are great" section, and we have
13 kind of a --

14 CHAIRMAN BABCOCK: A nice, neutral phrase.

15 HONORABLE TRACY CHRISTOPHER: -- longer
16 version and a shorter, simpler version for you to look at.
17 One is the e-mail and one is just the plain piece of
18 paper, and Justice Bland has given me a lot of editorial
19 help with respect to the longer version, typos and, you
20 know, case problems, which I'll be glad to incorporate
21 into the longer version if people like the longer version
22 to clean up the problems with it. But we are hoping to
23 come back to the Supreme Court Advisory Committee -- the
24 Pattern Jury Charge Committee is hoping to come back to
25 the Supreme Court Advisory and ask them to approve sort of

1 wholesale revisions to Rule 226a, because as part of our
2 plain language initiative in the Pattern Jury Charge
3 Committee we did some field testing of the Rule 226a
4 instructions and some of the pattern jury charges and, lo
5 and behold, found out that the jurors didn't really
6 understand what they were reading or having being read to
7 them.

8 So the easiest thing for the Pattern Jury
9 Charge Committee to do was to start out with the Rule 226a
10 instructions, and so we've done that. I thought we had it
11 finished, but not quite finished, and so probably the next
12 time, next June, we'll ask the entire Supreme Court
13 committee or maybe have to refer it to the 226a committee
14 of our group. I don't know how that works, but so this
15 would be just one insert into what we hope is a total
16 revision of 226a to make it more understandable to jurors.

17 So we have -- as I said, we have two
18 versions. One is a little longer, a little more flowery,
19 a little more flag-waving, I think. The other, shorter,
20 simpler, perhaps doesn't quite convey as much "lawyers are
21 great," but we thought it was -- I'm here under two
22 committees. We, the Pattern Jury Charge Committee, liked
23 our plainer, simpler version; and we in the subcommittee
24 that Chip put me on likes the flag-waving version. So
25 those are the two versions for people to look at.

1 The previous reasons why people didn't want
2 it were problems when we had pro ses. We could cure that
3 issue by making a little optional notation to the judge,
4 perhaps a problem when it was a lawyer malpractice case as
5 to whether this would somehow nudge people in favor of
6 lawyers. Again, we could cure that issue with a little
7 optional instruction to the trial judge not to read this
8 particular section. So that's what I have. That's our
9 report.

10 CHAIRMAN BABCOCK: Okay. Thanks, Judge.
11 Buddy.

12 MR. LOW: A little bit of history. David
13 Beck is the one that came to us with this. He wanted to
14 do something that would help us with, quote, lawyer
15 bashing, you know, how lawyers do these things and they
16 think they're bad. So Alistair brought something, and I
17 don't know, I made some suggestions, and so you said, "Why
18 don't you and Alistair get together?" So Alistair wrote
19 me or e-mailed me and said, "I'm busy, draft something,"
20 so I just drafted something, sent it to him. We corrected
21 it and basically what the longer version -- which Alistair
22 took mine and, you know, added to it and helped it, so I
23 have mine, but I don't propose it. I propose his.

24 It was to show that each lawyer is working
25 for their jurors, that they are working for them to bring

1 them the best evidence they can, and if each side
2 represents vigorously his client under the Rules of
3 Evidence and so forth then they will have all the relevant
4 facts so they can do their job, so that kind of the
5 lawyers are working for the jury, that was the thing I
6 wanted to get over, and the fact that the jury is
7 important and the lawyers are really working for them so
8 they can do their job.

9 So that was basically what Alistair and I
10 were conveying in the longer one. I don't know, I haven't
11 read the shorter one, I just got it, what it does for
12 lawyer bashing. I don't know. That's what we were trying
13 to accomplish.

14 CHAIRMAN BABCOCK: Yeah. Okay.

15 HONORABLE TRACY CHRISTOPHER: Well, the
16 shorter one also includes the provision that, you know,
17 this is what the lawyers are supposed to do and the
18 lawyers will help the jurors do their job.

19 MR. LOW: Okay.

20 HONORABLE TRACY CHRISTOPHER: We just kind
21 of distilled it and made it a little simpler.

22 MR. LOW: I'm not saying I'm against it. I
23 just haven't read it.

24 MR. GILSTRAP: Chip?

25 CHAIRMAN BABCOCK: Yeah, Frank.

1 MR. GILSTRAP: Well, you know, the problem
2 here is to seek to become less controversial we become
3 innocuous, and at the same time, you know, this short
4 version has got -- look at the first two sentences. "The
5 reason we are having this trial is the parties disagree.
6 This trial will be the process we use to resolve this
7 disagreement." Well, that's not right. We're having a
8 trial because my client is lying here in a wheelchair.
9 That's why we're having this trial.

10 I mean, anything you do is going to a
11 certain extent comment on the process that's going on, and
12 I think that's the danger we've got, we have here. It's
13 either -- it's going to affect the plaintiff or
14 defendant's interest in some way, and I'm not sure that
15 this really is a fruitful exercise.

16 CHAIRMAN BABCOCK: Yeah. I think that
17 sentiment has been -- carried the day with a majority;
18 albeit slim, in the two votes we've taken, but -- and I
19 think this is the end of our road. We just need to have
20 this language and either tell the Court that we really
21 think it's a bad idea or not. And we've got two versions
22 to choose from, but I hear what you're saying.

23 Yeah, Ralph.

24 MR. DUGGINS: Is the other version this one
25 that's got four paragraphs?

1 CHAIRMAN BABCOCK: Yes.

2 MR. WATSON: And we have to choose between
3 them or we have to choose one of them?

4 CHAIRMAN BABCOCK: No. You can continue to
5 vote and say it's a horrible idea or you can choose
6 between them. Jim, what did you just -- did you raise
7 your hand? I'm sorry.

8 MR. PERDUE: Oh, no, you made a comment
9 about it being a horrible idea, and I was just nodding my
10 head.

11 CHAIRMAN BABCOCK: I thought you kind of
12 involuntarily raised your hand, too. Yeah, Ralph.

13 MR. DUGGINS: I was going to say, my view is
14 that we should not do anything, but if we are, the four
15 paragraph version is too long, and I think the jury
16 already is apprehensive about the length of the
17 boilerplate instructions, and the one that has "Alex,
18 perhaps your notes," the only comment I have there is what
19 do you do when a party is pro se? I mean, does it somehow
20 disparage the pro se party where it says "parties have" --
21 "the parties have lawyers"?

22 CHAIRMAN BABCOCK: Yeah. Yeah. Somebody
23 brought up the other day, too, what if it's an attorney
24 malpractice case. I mean, there are some issues there.
25 Buddy.

1 MR. LOW: Let me set the record straight. I
2 voted against the whole thing, but I made the same
3 statement, if we're going to have something, then we ought
4 to do it a certain way.

5 CHAIRMAN BABCOCK: Right.

6 MR. LOW: So don't put on the record that
7 I'm for it just because I wrote it.

8 CHAIRMAN BABCOCK: Okay. Yeah, Nina.

9 MS. CORTELL: It seems to me on the short
10 version we could address the comment just by deleting the
11 first two sentences.

12 CHAIRMAN BABCOCK: I'm sorry. I didn't hear
13 the last part.

14 MS. CORTELL: The e-mail version, if you
15 just struck the first two sentences and start, "In a
16 trial," then I think you have captured what you need to
17 and you have resolved the problem raised. I don't
18 remember who made the comment. I think that was Frank.

19 MR. GILSTRAP: I agree. We could pass that
20 and just put a note in saying "leave this out if one of
21 the parties is pro se." You know, that would work. That
22 would give us something, and it's something we could all
23 agree on.

24 HONORABLE TERRY JENNINGS: Well --

25 CHAIRMAN BABCOCK: Yeah, Judge.

1 HONORABLE TERRY JENNINGS: I was at the
2 conference where David Beck spoke with Justice Hecht about
3 this whole concept of trying to boost our image with
4 people, and one of the few chances we get is with juries
5 who actually come in, and most of whom leave with a
6 positive attitude after they have actually participated in
7 a trial, but I kind of think that language is important,
8 and I'm looking at the e-mail version, "The reason we are
9 having a trial is that the parties disagree."

10 And I would suggest incorporating language
11 that "The parties disagree about facts of the case. Under
12 our constitution or our system of government it is juries
13 that decide these important factual issues," or something
14 like that, because I think that's what Beck was trying to
15 get across, is that, you know, talking about system of
16 government here that you-all are deeply involved in, there
17 is a reason why you people are here, because under our
18 system of government it's the juries who decide these
19 important factual issues, not some, you know,
20 administrative bureaucrat somewhere.

21 CHAIRMAN BABCOCK: Yeah. And Tracy
22 presented this -- Judge Christopher presented this at the
23 Houston Bench/Bar and as I reminded her there, she left
24 out a sentence that said, "If you need a lawyer, call
25 David Beck, 1-800." Okay. Any other comments about this?

1 Why don't we take a vote one more time on
2 whether or not we think it is a good or a bad idea to have
3 some language and then we'll pick between the two versions
4 here. How many people think there should be some "lawyers
5 are great" language? How many are in favor of that?

6 How many against? 13 to 2 against. Okay.
7 But if we're going to have some language, which of these
8 versions, the e-mail shorter version or the longer
9 version? How many for the e-mail shorter version?

10 MR. GILSTRAP: With the --

11 MR. LOW: With the amendment?

12 CHAIRMAN BABCOCK: With a friendly
13 amendment.

14 MR. GILSTRAP: Just taking the first two
15 sentences out?

16 CHAIRMAN BABCOCK: Yeah; whatever.

17 HONORABLE TRACY CHRISTOPHER: And adding in
18 the constitution again?

19 MR. STORIE: Yeah.

20 CHAIRMAN BABCOCK: How many are for the
21 shorter version?

22 Longer version? 13 to 1, the shorter
23 version. Thank you, your Honor.

24 Now we go to Buddy, Rule 904.

25 MR. LOW: This time I'm not going to vote

1 against myself.

2 CHAIRMAN BABCOCK: You're doing so well.

3 MR. LOW: This shows how fair I am. All
4 right. 904, nothing new here. This has come up -- this
5 is the third time, and basically this came from the State
6 Bar Committee on Evidence. They worked on this the last
7 couple of years, and they really have some outstanding
8 people. Came back, there were some suggestions, some
9 criticisms, so forth. They went back, worked it again,
10 did that, and now we're back again.

11 I asked them to give me the reasons why we
12 should do this, and first of all, we have a Rule 18.001 in
13 the Remedies Code that leaves a lot to be desired. The
14 State Bar committee was trying to get together. They show
15 that form of the affidavit, not the -- the form of the
16 counter-affidavit. The State Bar committee does both. It
17 makes it clear that this does not purport to show -- or
18 you can't do this by affidavit that the treatment was
19 necessitated by reason of the accident.

20 It's only -- there is a lot of hearsay in
21 here, but the purpose was so people wouldn't have to bring
22 witnesses. Well, it ended up where the defendant could
23 just say they object, and that's it. Under this form they
24 have to object, showing you specifically what they object
25 to and why, and you can still use your affidavit, the

1 plaintiff can, and they can use their affidavit.

2 Now, the only criticism of this I've heard I
3 think was from Benny, and Benny was concerned -- well, let
4 me go back. There was some concern about whether this
5 would be construed to mean that, you know, you wouldn't
6 have to bring a doctor to prove, you know, causation, and
7 that's made clear. I think that's made clear. Benny had
8 a problem with the fact that somebody then files a
9 counter-affidavit by someone not qualified and then they
10 can introduce that counter-affidavit.

11 The answer to that is if somebody filed a
12 counter-affidavit by someone not qualified, you can move
13 to strike that counter-affidavit, I mean, just like you
14 can any other affidavit. So it's just a question of
15 whether you want to correct some of the problems they see
16 with the present statute, and I got an e-mail a couple of
17 days ago as to reasons why the State Bar says this --
18 their committee says this is good.

19 It says, "It addresses matters of evidence
20 properly included and that should be found in the Texas
21 Rules of Evidence," so I guess they're saying it ought to
22 be in the Rules of Evidence. "Secondly, it contains a
23 form that practitioners may use in drafting
24 counter-affidavits," which is not in 18.001 or 2, "reduce
25 the cost of trial to plaintiffs. In the event a

1 counter-affidavit is filed not requiring testimony from
2 the expert provider you can show what you object to and
3 why," and these others, we've been over the reasons. So
4 do we want it? It's a better thing than what we've got,
5 and I think it's good.

6 CHAIRMAN BABCOCK: Okay. Carl.

7 MR. HAMILTON: Paragraph (g) there says the
8 rule supersedes any Rule of Evidence, Rule of Procedure,
9 or statute.

10 MR. LOW: Yes, the reason --

11 MR. HAMILTON: Including 18.001.

12 MR. LOW: No, not including -- well, sure,
13 it would be that, but the reason for that is Government
14 Code 22.004. We discussed this before, that under 22.004,
15 the Supreme Court on any procedural rule can pass
16 something, and if the Legislature, you know, doesn't do
17 something about it, it supersedes that. The Legislature
18 can do something about it, but as a practical matter, the
19 Court, if they chose to do this, they would go to the
20 Legislature and talk to the legislative leaders. We
21 wouldn't just pass it, and I mean, you know, we would have
22 to explain to them why it's better, so we wouldn't be just
23 overruling the Legislature without -- the Court knows how
24 to handle that if they want this rule.

25 CHAIRMAN BABCOCK: And yeah, Benny.

1 MR. AGOSTO: I still haven't heard what's
2 wrong with 18.001.

3 MR. LOW: All right.

4 MR. AGOSTO: I have been practicing with it.
5 I've taught it. It is -- if we go back to the legislative
6 intent of the statute itself, the reason why it was passed
7 is to save money, save litigants having to bring down
8 doctors and experts and witnesses on small cases. The
9 case law that we have before us tells us two things. One,
10 on the causation side, that you need a doctor to prove
11 certain damages when the damages are within reasonable
12 medical probability or some other phrase, if that's the
13 probability that's required, or the plaintiff's own
14 testimony with medical records can be used to prove
15 causation on cases wherein there is -- you know, the
16 reasonable person would understand that if my back didn't
17 hurt before the car wreck and it hurts now, that evidence
18 is enough to prove causation, when combined with medical
19 records pursuant to 18.001.

20 That presumes that it is a small case that
21 we're wasting money if we have to bring down experts to
22 prove those damages. So that's one way to do it. Through
23 the affidavit way, we would prove reasonable necessity of
24 the medical records, and we were discussing earlier -- and
25 I'll get to the counter-affidavit in a minute, what I

1 think about that, but with a counter-affidavit that would
2 argue that it's unreasonable and make it evidence, which
3 is what I have a big problem with under the proposed 904,
4 then the trip to the emergency room on the ambulance ride
5 would be argued as not related to the accident, and then
6 that's evidence without bringing an expert, without
7 designating an expert.

8 I mean, there's a lot of problems with then
9 having to litigate that case and go counter to the
10 original intent of the drafters when that statute was
11 implemented, and so when I hear people say, you know --
12 and, Buddy, I know you're kind of following along with
13 what's been told to you, but, you know, I don't see a
14 problem with 18.001 for the cases by which it was created
15 for. To say that now we're going to be able to allow an
16 affidavit, a counter-affidavit from a doctor, you know,
17 presumably it's going to have all the qualifications, you
18 know, 702 qualifications that that doctor's going to have,
19 to allow that affidavit saying that the treatment from the
20 ambulance ride is not reasonable and necessary, and now
21 that becomes evidence for the jury to look at.

22 That piece of the affidavit is going to bear
23 evidence, very heavy evidence, for the jury to decide
24 without the plaintiffs then being able to
25 cross-examine that doctor, without the plaintiff having

1 that doctor designated as an expert, because the statute
2 as I read it says either you designate an expert or you
3 file a counter-affidavit. You can do one or the other.
4 Of course, it also says that you can then if you file it
5 60 days before trial before the first evidence in the case
6 then you can presumably reopen discovery, the way it's
7 read -- the way it's written, and take depositions of
8 those people that are now, right, signing this affidavit,
9 the affiant. That doesn't save money. That adds. Now
10 we're taking depositions of a doctor who 60 days before
11 trial has signed an affidavit. So I see a lot of problems
12 in a case where there's small damages.

13 Of course, if there's broken bones or a
14 quadriplegic injury then there's going to be doctors of
15 all kinds and there's going to be depositions of all kinds
16 proving up certain damages, but on a soft tissue case
17 where there is a dispute and trial is eminent, then I have
18 a major problem, and I think a lot of the people that
19 represent litigants coming to trial and are trying to save
20 money have a major problem with that becoming evidence,
21 and that's just one of the parts of 904.

22 CHAIRMAN BABCOCK: Buddy.

23 MR. LOW: First of all, the present rule
24 doesn't say that you have to designate an expert. 18.001,
25 18.002 doesn't address that. But, secondly, it doesn't

1 make it clear. It says the counter-affidavit must give
2 reasonable notice of the basis, so people are just
3 objecting because "I don't think it's right." All right.
4 Now, you have to be specific, and if they just give you
5 that notice then you can't file your affidavit. You've
6 got to bring a custodian or a doctor or somebody to prove
7 those bills once they do that.

8 So this makes the affidavit admissible for
9 the plaintiff and -- but it also says that
10 counter-affidavit must be specific, you must give -- if
11 it's going to be a doctor, you must give his
12 qualifications and things like that; and if you don't like
13 that, you can strike it, if it doesn't mean the Daubert
14 test or something like that. It goes much further than
15 18.001 and 18.002, which is not -- it's not very clear,
16 and it's been cited for everything. This clears up what
17 you can do, what you can't do, what your affidavit ought
18 to be and your counter-affidavit.

19 CHAIRMAN BABCOCK: Benny's argument, as I
20 understand it, is that if we pass this, if we do this --

21 MR. LOW: Yeah.

22 CHAIRMAN BABCOCK: -- if we have this
23 affidavit, it's gong to make it more expensive, and I hear
24 your argument is it's going to make it less expensive.

25 MR. LOW: That's exactly what I'm arguing.

1 MR. AGOSTO: I'll add something to that
2 argument. The Turner vs. Peril case, which is the law
3 concerning counter-affidavit case or scenario, clearly
4 articulates and spells out for us what the
5 counter-affidavit should say and how it should be written,
6 by whom, and what the qualifications should be. It
7 clearly articulates that. It has to fit the 702
8 qualifications, and the counter-affidavit, you know, the
9 general rules of affidavit, can't be speculative, it must
10 be direct to the issue by the person who's qualified, and
11 if not then you can move to strike and the court then can
12 strike. So we have a case that under 18.001 and the Peril
13 vs. Turner case, or Turner vs. Peril, gives us the
14 guidance on how to deal with it, and that's the way we've
15 been dealing with it.

16 So going back to my original question, if we
17 have a statute that works, and the intent and purpose of
18 it was to save money for the litigants and has been
19 working so far, we have a clarification by the court of
20 appeals with a specific case on point with what happens
21 when a counter-affidavit is deficient or defective and how
22 to strike it, then what is wrong with 18.001 and the law
23 that we have?

24 CHAIRMAN BABCOCK: So you say it's not
25 broken, so don't fix it.

1 MR. AGOSTO: That's what I'm saying.

2 CHAIRMAN BABCOCK: Richard.

3 MR. LOW: Well --

4 CHAIRMAN BABCOCK: Well, get Richard first
5 and then you.

6 MR. MUNZINGER: I just was curious why
7 subsection (b) lets an unqualified person certify that a
8 medical service -- I'm applying this to a medical case.

9 MR. LOW: Oh, okay.

10 MR. MUNZINGER: Subsection (b) would let a
11 chiropractor's high school-educated clerk under oath
12 certify that auricular therapy to treat paralysis was
13 necessary, but if I were to contest that, I can't do it
14 under subsection (c) with my clerk because my clerk
15 doesn't have a degree in medicine or something. I don't
16 understand why you treat these differently.

17 MR. LOW: Well, first of all, I didn't draft
18 it, but secondly, and I'm giving you hearsay, and this
19 whole thing is hearsay, and I'm giving you what I hear
20 from the State Bar or their committee, but as I understood
21 it, there are -- I mean, all the clerk or somebody that is
22 not an expert, all they can do is say that these bills are
23 reasonable, the costs, and necessary for the treatment. I
24 don't understand -- maybe I don't understand your point.
25 You're saying --

1 MR. MUNZINGER: Well, the point is
2 subparagraph (b) of Rule 904, "An affidavit that the
3 amount a service provider charged for a service was
4 reasonable at the time and place that the service was
5 provided and that the service was necessary under the
6 circumstances."

7 MR. LOW: Is that affidavit of custodian?

8 MR. MUNZINGER: Well, it's the affidavit of
9 whoever is certifying to this, so --

10 MR. LOW: We've got two. We've got one,
11 affidavit of service provider, and another one. Which one
12 are you looking under?

13 MR. MUNZINGER: I'm looking at Rule 904,
14 "Affidavit Concerning Costs and Necessity of Service."

15 MR. LOW: Okay.

16 MR. MUNZINGER: "Applies to civil actions
17 only, but not to an action on a sworn account," and as I
18 read subparagraph (b), the horrible that I just described,
19 a person with less than a high school education is now
20 swearing to an oath that auricular therapy of a
21 chiropractor, which is where they take a picture of a
22 fetus, put it on the patient's ear, and select -- upside
23 down and select the point where the elbow was on the ear
24 for sticking a needle in the ear, and that's going to cure
25 that particular process. Now, that's a true fact. That's

1 going to be admitted as having been a necessary service,
2 all \$40,000 of it.

3 CHAIRMAN BABCOCK: Could we have a less
4 creepy hypothetical about sticking things in your ear?

5 MR. MUNZINGER: I only base these things on
6 personal experience, Chip. That's a true story.

7 CHAIRMAN BABCOCK: Carlos, Carl, and then
8 Judge Christopher.

9 MR. LOPEZ: I don't have any explanation
10 that's going to make Richard happy about 18.001. I mean,
11 it all goes back to the -- when I was on county court I
12 used to get these all the time, you-all know that, and my
13 response to defense lawyers who would make that argument
14 was, "I didn't write the statute, but it looks pretty
15 clear, and it allows a custodian who doesn't have
16 apparently any other training to make an affidavit, but
17 the counter-affidavit has got to be done by someone who
18 actually knows what he's talking about. It doesn't sound
19 fair to me, either, but go write your Legislature." That
20 was my answer from the bench consistently, and I think it
21 was the right answer for a judge to give. It may not have
22 made you feel any better.

23 That's a very different issue than the one
24 Benny brings up, which is we have this case that tells us
25 how to strike it. What I don't -- I haven't done these in

1 years, thankfully, but what I don't know -- and, Benny,
2 I'm asking you not rhetorically -- is does that case
3 address the practical effect of what the trial judge is
4 supposed to do when the trial judge says, "You're right,
5 defense lawyer. I am going to strike the counter -- I am
6 going to -- I agree that the counter-affidavit is proper.
7 I'm going to" -- then what?

8 And back in the old days you had a split. I
9 don't know about, you know, in your jurisdiction, but at
10 least in Dallas, and I don't know about anywhere else, you
11 had a split. Some judges would do it one way, other
12 judges would do it a different way, and regardless of
13 which way is right or wrong, it probably isn't good to
14 have two different outcomes based on which judge you're in
15 front of, and so I don't really care which way it ends up,
16 but I do care that it end up some way that allows if that
17 counter-affidavit is valid, then what.

18 And I think the compromise -- I'm
19 speculating. The compromise was, "Hey, plaintiff's
20 lawyer, would you rather just let me have both affidavits
21 go to the jury, or would you rather make me make you spend
22 more money than your case is worth, more money than is
23 actually in controversy, trying to prove your case?" And
24 some plaintiffs would say, "I'd rather have both
25 affidavits go to the jury so that I don't have to bring a

1 doctor because I can't afford to pay this doctor \$3,000 to
2 come testify in my case where there's only \$1,500 in
3 controversy." So it's just a practical problem.

4 CHAIRMAN BABCOCK: Carl.

5 MR. AGOSTO: Can I respond to his comments
6 since he said it wasn't rhetorical? Just briefly, and
7 it's okay. I appreciate the question. The Turner vs.
8 Peril is a first impression case, and what it articulated
9 was the judge is going to do the gatekeeper's job, which
10 is under the Robinson/Daubert analysis look at the
11 affidavit, look at the credentials or qualification of the
12 person who signed it, and if it meets Broaders vs. Wise
13 then it's in.

14 It's not that it's evidence. It's
15 controverting affidavit information that now at trial we
16 can argue that the treatment was not reasonable and
17 necessary. That's all that we're facing in a trial. We
18 have a properly filed plaintiff's affidavit and a
19 defendant who has a counter-affidavit in that trial, the
20 argument without expenses, without experts, the
21 cross-examination is going to be, "Well, it's not really
22 reasonable and necessary because" and go on into it.

23 MR. LOPEZ: So but in that scenario did --
24 what happened, did the affidavits go back to the jury?

25 MR. AGOSTO: No, the affidavits don't go

1 back to the jury. The medical records and bills go back
2 to the jury.

3 MR. LOPEZ: And the defendant is then
4 allowed to argue --

5 MR. AGOSTO: Controverting affidavit allows
6 the defense lawyer to argue all those bills may not have
7 been necessary because of something else. That's what
8 made the trial a trial of antagonistic, you know,
9 plaintiff against defense. If you don't follow the
10 procedure under the statute you can't then at trial say --
11 because now it's been admitted, pre-admitted, right, you
12 can't now say, "Oh, no, this was related to something
13 else" without any substance. So the controverting
14 affidavit allows the adversarial process to continue at a
15 low expense.

16 If now you bring the defense or
17 controverting affidavit in as evidence, plaintiff has some
18 bills that they probably proved up, no doctor, nobody on
19 the other side to controvert it except some affidavit the
20 jury is going to sit there and read without
21 cross-examination, without anything else. That is
22 blatantly unfair.

23 MR. LOPEZ: But so what is the -- let me ask
24 the million-dollar question. What is the evidence on
25 which the argument is based that they somehow aren't

1 related or they somehow shouldn't be given by the jury if
2 the only evidence of it was this affidavit from this
3 doctor that the jury never saw?

4 MR. AGOSTO: You get the bills, and you can
5 can go through the bills and argue them.

6 MR. LOPEZ: Right. So you've got the lawyer
7 making an argument without --

8 HONORABLE TRACY CHRISTOPHER:
9 Cross-examination.

10 MR. AGOSTO: Cross-examination.

11 MR. LOPEZ: Who does he cross-examine?

12 MR. AGOSTO: The witness.

13 MR. LOPEZ: It's all done by affidavit. I
14 mean, the doctor's not there.

15 MR. AGOSTO: There's no doctor. It's the
16 plaintiff who claims "I had a stiff neck, but I had it ten
17 years ago, too," so the defense lawyer in his wisdom and
18 zealousness will argue, "You had it before," and present
19 all that to the jury, and the jury decides whether the
20 injury was related to the accident or not, and it's all
21 within the reasonable expense, and the trial is had.
22 Everybody has their day in court.

23 MR. LOPEZ: So if the affidavit, the defense
24 affidavit, is valid --

25 MR. AGOSTO: It's valid to make the

1 argument.

2 MR. LOPEZ: It allows them to make the
3 argument. If it's not valid, then what?

4 MR. AGOSTO: You can't controvert the
5 medical bills that were proven up by affidavit by the
6 plaintiff.

7 MR. LOPEZ: They can't then ask the
8 plaintiff on the stand -- they can't cross-examine the
9 plaintiff?

10 MR. AGOSTO: They can cross-examine the
11 plaintiff, but not against the reasonable and necessity of
12 the bills. They can impeach the witness any way they want
13 to, according to the rules of impeachment.

14 MR. LOPEZ: Causation and all that stuff.
15 Okay.

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: I may have been doing it
18 wrong, but based on the statute we always assumed that
19 prior to that the plaintiffs had the burden of proving
20 reasonableness and necessity of the medical bills.

21 CHAIRMAN BABCOCK: Right.

22 MR. HAMILTON: Statute comes along and says
23 if you do this affidavit that's going to be enough to go
24 to the jury unless you get a controverting affidavit. If
25 you get a controverting affidavit, it wipes everything out

1 and you go back to square one, but then the way this rule
2 is written it shifts the burden now because it makes that
3 affidavit, that first affidavit, admissible enough to
4 support the verdict even if you get a controverting
5 affidavit.

6 So it changes -- I think it changes the
7 statute, changes the result, and now the burden is shifted
8 to the defendant to prove that it's not reasonable and
9 necessary when it ought to be on the plaintiff.

10 CHAIRMAN BABCOCK: Judge Christopher.

11 MR. LOW: Well, but first --

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: First of all, Richard, the statute
14 as read does exactly what you say. The present statute
15 says that "Unless a controverting affidavit is filed as
16 provided with this section, an affidavit that the amount a
17 person is charged for a service was reasonable at the time
18 and place of service provided and the service is necessary
19 and sufficient evidence to support a finding," the
20 language is the same from the statute to the language you
21 read.

22 Now, on the counter-affidavit, the statute
23 says, "Counter-affidavit must be made by a person who's
24 qualified by knowledge, skill, expertise, training,
25 education, to testify," so forth. So that's not changed

1 from the statute. Basically, if I understand what they're
2 doing, what they are trying to do is make -- Benny cited
3 one case. There are a bunch of cases under this. There
4 are some of them talking about whether you can prove a
5 medical necessity and so forth, and Benny I'm sure is
6 aware of there are number of cases, not just the case he
7 cites. There are a number of them.

8 So there's been some confusion, and from
9 what I understand they're trying to do here is make it so
10 that you can't just object and just -- you don't have to
11 state as specifically as what this proposed rule does.
12 You can just say, well, because it's not fair in the
13 community. You don't have to -- and then you're back to
14 square one. You've got to bring the medical director down
15 there to prove it. This way you're going to have your
16 medical bills proved, not that's caused by this accident,
17 but to be fair on the other side, they can introduce their
18 counter-affidavit by a custodian or what -- so that's
19 basically the difference.

20 CHAIRMAN BABCOCK: Judge Christopher.

21 HONORABLE TRACY CHRISTOPHER: I think this
22 is a significant change in the law, and I don't think
23 that -- and I think it favors the defendants the way it's
24 written, and I don't think that there is a problem that
25 needs fixing. Okay. So I think it's a significant change

1 in the law because it now makes the affidavits admissible
2 in evidence, which they haven't been before, and the
3 reason why I think it favors the defendant is because the
4 plaintiff's affidavit is going to be by a custodian, all
5 right, because that's who fills out those affidavits.

6 Then the defendant is going to come in with
7 some doctor with their CV that's going to have all sorts
8 of reasons for why these bills are not reasonable and
9 necessary. So at that point if both of those affidavits
10 go back to the jury, you've got a custodian of the records
11 versus a doctor, and you can just hear the argument
12 involved. Okay. So that's why this proposal favors this
13 defendant when you allow both affidavits to go back.

14 And then my third point is I don't think
15 there is a problem that needs fixing, and I think that we
16 emasculate the 18.0001 purposes by this change because the
17 purpose of the statute was to provide a cheap way for
18 people to get their medical bills proved up and into
19 evidence.

20 CHAIRMAN BABCOCK: Jim.

21 MR. PERDUE: The statute was passed in
22 1985 --

23 CHAIRMAN BABCOCK: I'm sorry, Hayes. Hayes,
24 you're next. Sorry.

25 MR. PURDUE: I'm sorry.

1 MR. FULLER: Go ahead.

2 MR. PERDUE: It was a unique opportunity to
3 follow and agree with Judge Christopher, so I jumped in.

4 HONORABLE TRACY CHRISTOPHER: I'm in trouble
5 now.

6 MR. PERDUE: The statute was passed in 1985.
7 When this thing was first laid out I think Judge Hecht
8 pointed out that there is -- if you've got a case with a
9 thousand dollars in medical expenses, there was a
10 legislative consideration on how can you get those medical
11 records proven up in a cheap and efficient way. I think
12 it's unique that we're having this conversation at the end
13 of the day, given the way that we spent the morning with
14 almost unanimous consideration that one of the problems
15 that we're facing in the system and one of the concerns
16 within the entire system and people not having access to
17 the system or leaving the system is not just because of
18 delay but also because of cost.

19 18.001 is clearly, and it was intended, as a
20 cost-cutting measure as far as litigation. That was what
21 it was designed to do. This -- and so here's
22 philosophically the reason why it's concerning that the
23 committee is taking this up. This is by its own terms and
24 admits it is a change in the law. It is a change in a
25 legislative enactment. It is a change from a standard of

1 a legislative enactment, and that to me as far as
2 rule-making -- and I know I raised this last time when it
3 was laid out by Bruce, and you pointed out that sometimes
4 the Court does that, but I mean, there is a Federal court
5 case that says 18.001, in fact, is not a procedural
6 provision. It's a substantive right to a plaintiff in the
7 State of Texas.

8 Now, if you've got a statute on the books
9 that is substantive and you've got a rule now that is by
10 its own terms designed to change that standard, and -- I
11 wholly agree with Judge Christopher. This is --
12 regardless of the merits of being pro-defendant or
13 pro-plaintiff, you've got a statute on the books that's
14 designed to limit costs involved in litigation. This rule
15 I think unavoidably will increase those costs and change a
16 legislative enactment to a totally different standard, and
17 that, just to me, plaintiff, defendant, is a dangerous
18 thing to weight into, and so that's why I think -- Buddy,
19 I know I've talked to you twice about this. I got off the
20 phone, I talked to a bunch of members of the State Bar
21 committee on the proposed rule, and they did, they worked
22 real hard on this thing, and I know they went around and
23 around on a bunch of these issues, but I keep reading this
24 provision on counter-affidavit form, but the problem is,
25 is that what this is doing is it's taking a form, but it

1 makes it evidentiary. It moves these affidavits into
2 evidence --

3 MR. LOW: It does.

4 MR. PERDUE: -- as opposed to being what
5 they are now, is essentially a notice kind of standard
6 level, and that is just a whole wholesale change, and
7 it's -- I second all the concerns.

8 CHAIRMAN BABCOCK: Hayes, and then Justice
9 Duncan.

10 MR. FULLER: I would agree with two of Judge
11 Christopher's points. I think it is a significant change
12 in the law, and I think it does tend to favor the
13 defendant. I'm not sure I agree with the "If it's not
14 broke, don't fix it." I'm not sure all courts are
15 applying it the way Benny says they are applying it.
16 Filing the controverting affidavit doesn't mean that you
17 get to debate an issue. Some courts are taking the
18 approach that I think the statute would indicate and Carl
19 says, is that when the controverting affidavit is filed
20 the plaintiff better bring their witnesses down there to
21 prove up their bills or there is no proof of those bills,
22 and I think that's the specific issue that the court or
23 that the committee, the State Bar's committee --

24 MR. LOPEZ: Is trying to fix.

25 MR. FULLER: -- is trying to deal with in

1 order to try to preserve some semblance of a low-cost
2 trial. If you file your affidavits and they are then
3 controverted, instead of having to go get your witnesses
4 and now prove up your initial -- the plaintiff's
5 affidavits on medical expenses of reasonableness and
6 necessity, both affidavits can then go to the court or to
7 the jury as proof, and the jury can decide which
8 affidavits are best.

9 I think it does -- I'm not sure -- I think
10 that in that sense this proposal may be better than what
11 we have, but not much, because the way that affidavit is
12 set up the counter -- the controverting affidavit is going
13 to say something along the lines of "These aren't
14 reasonable and necessity" -- or "necessary because none of
15 this was caused by the accident" or something along those
16 lines, and it's going to be signed by a doctor, and the
17 defense lawyer is going to stand up there in front of the
18 jury and say, "Folks, there's two affidavits here. One of
19 them is signed by, you know, the 18-year-old clerk who did
20 the bills, and this is signed by Dr. Huttado, you know,
21 and, you know, the reason why this isn't reasonable and
22 necessary is because there is no causation, and there is
23 not one witness in this courtroom who will say they are,
24 other than the plaintiff who has got something to gain."

25 To that extent, like I say, you're back to

1 where you started, because if you don't want to get caught
2 with that the plaintiff still has to go get their
3 witnesses to controvert the controverting affidavit. So,
4 you know, I think it's arguably better. I don't think
5 it's that much better. I think it's a problem, but I
6 don't think we've got the solution yet.

7 CHAIRMAN BABCOCK: Sarah, then Judge
8 Peeples, then Carlos, and then Ralph.

9 HONORABLE SARAH DUNCAN: I just have a ticky
10 little problem with this. I don't want to take sides on
11 the plaintiff/defendant debate.

12 CHAIRMAN BABCOCK: Well, you're going to
13 have to soon.

14 HONORABLE SARAH DUNCAN: I'm against the
15 rule because it makes what I think can only be called
16 incompetent evidence competent and legally sufficient, and
17 that cannot be. That cannot be. You can't take a record
18 custodian and have them testify on reasonable and
19 necessary medical costs of which they have no personal
20 knowledge and no expertise and make that legally
21 sufficient evidence that will withstand a JNOV, and that's
22 what this rule does. You can't -- that can't work in the
23 system that we have.

24 CHAIRMAN BABCOCK: Judge Peeples.

25 HONORABLE DAVID PEEPLES: This is a question

1 for Benny and Jim. It does seem to me that under the
2 proposal if you've got your affidavit, even if it gets
3 controverted, you know you're going to get to the jury on
4 your medical bills. They may not give them to you, but
5 you have raised a fact issue on that then, and that
6 doesn't seem to be the case under 18.001, and I just
7 question why that's such a defense thing.

8 HONORABLE TRACY CHRISTOPHER: Well, can I
9 answer that question, because the defense -- the
10 defendants, you know, defend a million of these little car
11 wreck cases, and they're mostly small car wreck cases.
12 They don't spend the money to hire a doctor to do these
13 controverting affidavits, okay, because all it does is put
14 the plaintiff back to square one where the plaintiff then
15 has to go get their doctor to come down. But if they
16 hire -- if they now can spend the money to hire a doctor
17 to do these affidavits and somehow that becomes
18 affirmative evidence for them for the price of the
19 affidavit from the doctor, that's how it's a benefit to
20 the defendant.

21 HONORABLE SARAH DUNCAN: Yeah.

22 HONORABLE DAVID PEEPLES: Then why does a
23 defendant need affirmative evidence when it doesn't have
24 the burden of proof on the issue?

25 HONORABLE TRACY CHRISTOPHER: They don't.

1 It's just a cheap way to have evidence.

2 HONORABLE DAVID PEEPLES: To get something
3 before the jury.

4 HONORABLE TRACY CHRISTOPHER: Yeah.

5 MR. AGOSTO: Because all that comes into
6 evidence on the plaintiff's side is the bills and the
7 records. If you prove them up, that's all that comes in.
8 You still have to prove up causation. The statute talks
9 about it. So all we're doing is saving time to get the
10 records admitted and the bills admitted and then somebody
11 has to prove up causation. If it's a plaintiff or the
12 doctor, the jury still has to weigh it.

13 Now, without doing anything else but hiring
14 an expert, a medical doctor that we all know is going to
15 be quick to sign an affidavit prepared by the defense
16 counsel, and put into the jury room, that's pretty cheap
17 defense to destroy the case on the plaintiffs's side if
18 all the plaintiff has is a plaintiff who says, "My neck
19 hurts" and an 18-year-old who signed an affidavit.

20 CHAIRMAN BABCOCK: Carlos.

21 MR. LOPEZ: But, okay, my question is, but
22 right now under the current statute, I think is what Judge
23 Peeples said, if the defendant goes out and gets that
24 doctor who signs it quickly and cheaply to destroy the
25 case and they do that under the current rule the way it's

1 written, what happens now?

2 HONORABLE TRACY CHRISTOPHER: The plaintiff
3 brings the doctor.

4 MR. AGOSTO: Plaintiff brings the doctor,
5 the plaintiff gets a deposition by written questions of
6 the custodian. There's a lot of ways, you know --

7 HONORABLE TRACY CHRISTOPHER: But the
8 defendant doesn't have any controverting evidence unless
9 they bring the big bucks to bring their doctor, and we're
10 allowing it to do that.

11 MR. LOPEZ: I have two situations it raises
12 for me. One is -- and this shows the regional
13 differences, and I won't name names because we're on the
14 record, but --

15 CHAIRMAN BABCOCK: Oh, go ahead.

16 MR. LOPEZ: When this first came out, I
17 mean, there was a law firm that did volume defense of
18 these small car wrecks, and if you had that law firm
19 defending you, you were going to have an affidavit by
20 doctor so-and-so, a counter-affidavit, in every single
21 little car wreck, every one of them. There were hundreds
22 of them, and so that's why we had this issue coming up all
23 the time, which is now what do we do? Here is the
24 affidavit, and does it knock out your evidence? Does it
25 keep -- does it force the plaintiff to do it? You know,

1 then we had the ancillary issue of if they don't file a
2 counter-affidavit and you've told them that by law they
3 can't controvert that, then isn't that a directed verdict?
4 Why isn't the plaintiff entitled to a directed verdict on
5 the reasonableness and necessity of the bills if there is
6 no counter-affidavit on file from which they can argue
7 against it?

8 CHAIRMAN BABCOCK: Ralph, then Justice Gray,
9 and then Jim and Judge Peeples.

10 MR. LOPEZ: It's complicated.

11 CHAIRMAN BABCOCK: Ralph.

12 MR. DUGGINS: Now, I don't practice in this
13 area, but what's -- why couldn't the plaintiff be required
14 to have the same -- the person who's signing the affidavit
15 have the same qualifications that the defense has to have
16 and then you've got -- you don't have the issue of the
17 clerk versus the doctor? That may seem to be a stupid
18 question, but --

19 MR. AGOSTO: We can answer the question.

20 CHAIRMAN BABCOCK: Jim.

21 MR. PERDUE: It goes to part of that answer
22 and it goes I think to Carlos's question. The Legislature
23 passed a statute that said that's what you can do, because
24 that's how you can do it cheapest. The way to -- and this
25 is a confusion that we got -- I know that Dorsaneo kept

1 asking me about the idea of necessity being causation.
2 Necessity is not causation. It's not proximate cause.
3 There's a case on that. Proving up an affidavit by an --
4 an 18.001 affidavit does not get you a per se showing of
5 proximate cause. It gets you a per se showing that
6 overcomes an old line of cases as far as medical expenses
7 that have to be reasonable and necessary, and that's all
8 it does.

9 So you've -- so what this rule does -- and,
10 Buddy, I keep thinking I can figure out a way to make it a
11 little bit more than a little better or a little bit
12 better than worse, but if you've got a case on point that
13 says if a insurance company goes and hires a chiropractor
14 to sign a thousand counter-affidavits, and that
15 chiropractor has absolutely no education, training, or
16 experience in orthopedics and orthopedic bills, that
17 doesn't qualify as a counter-affidavit.

18 So the way this gets into litigation and the
19 way it's answered by Turner vs. Peril -- and maybe I'm
20 just blessed to have Judge Christopher in Harris County,
21 but that affidavit doesn't get you anywhere as a defendant
22 because it is an unqualified -- it is an unqualified
23 challenge by case law and by the statute. And so, you're
24 right, there were a lot of defendants doing that, but the
25 case law says that you can.

1 MR. LOPEZ: This guy was an M.D.

2 MR. PERDUE: Well, and I think that one of
3 my concerns about -- and, Buddy, one of my concerns about
4 the language in the rule that keeps coming back to it is
5 there's really almost no guidance in this rule that is
6 consistent with what I think Turner vs. Peril says, which
7 is a counter-affidavit need be by somebody who is clearly
8 qualified within the area of medical specialty at issue.

9 Combine that with the new requirement in
10 this rule that the affidavit becomes evidentiary as
11 opposed to what it is now, which basically is just a
12 notice requirement that you're going to challenge the
13 reasonable and necessity, now you've got a piece of
14 evidence by somebody who may or may not be, you know,
15 fully qualified on the issue that is, according to this,
16 mandatorily going to come in; and, you know, there are --
17 there may be ways to make it better, but I don't know --
18 and if there is an issue, I don't know of a big complaint
19 of the 18.001 is not working; and when you talk about
20 changing a legislative enactment or changing a standard
21 that's on the books plus common law that informs it, and
22 it seems to be working, I don't know how we get to the
23 idea of essentially changing the standard through a rule.
24 CHAIRMAN BABCOCK: Justice Gray, did I miss
25 you before? I think I did. Sorry.

1 HONORABLE TOM GRAY: That's okay. It fits
2 better now. I don't know about the -- and Jim raises the
3 issues on the validity of what we can do in light of a
4 Federal case, and I won't get into that, but there's
5 obviously some dispute about what happens, and so I think
6 there needs to be a fix, and I'm like Ralph that I don't
7 practice in this area. I'm sorry about that, Ralph. I
8 couldn't remember the name right off, but I don't see this
9 a lot, but I thought -- and that makes the use of case law
10 dangerous because it becomes somewhat regional, as
11 evidenced by the difference between Dallas and Houston on
12 how these get treated, but --

13 HONORABLE TRACY CHRISTOPHER: No, no. We
14 follow the Dallas case.

15 HONORABLE TOM GRAY: Well, there seems to be
16 some disagreement as to whether or not you-all follow that
17 or whether or not Dallas is following the Dallas case.
18 But Benny I thought touched on something that seemed to me
19 to be the fix, that if the controverting affidavit simply
20 allows you to contest and talk about during the course of
21 the trial with the plaintiff, with whatever witnesses are
22 there, to controvert and talk about the issue, that's what
23 the defendant really wants to do.

24 The plaintiff still has the documents in
25 evidence, but the affidavits need not go to the jury, and

1 as a result, it still has the benefits of the cheap
2 presentation, but it doesn't have that kind of damning
3 effect, if you will, on the plaintiff's case of having the
4 expert counter-affidavit go back to the jury. The
5 defendant can still get up there and cross-examine the
6 witness, "Isn't it true that you hurt your back 14 times
7 before the date of the injury that you're suing me for?"
8 And that seems to me, if you just didn't let the
9 affidavits go to the jury would eliminate a lot of these
10 problems.

11 MR. PERDUE: That is a statement of present
12 law.

13 HONORABLE TOM GRAY: Well, but that is not
14 what Buddy and Carl and Carlos have said is happening in
15 practice when you file an affidavit that the judge may or
16 may not determine to be adequately controverting of what
17 happens.

18 MR. PERDUE: Well, but that would still
19 be -- the sufficiency of the counter-affidavit would still
20 be an issue.

21 MR. LOPEZ: But the committee -- I mean,
22 here is the assumption the committee made. The assumption
23 the committee made was that plaintiffs were having a real
24 problem -- and maybe the assumption is wrong, that
25 plaintiffs are having a real problem in cases where the

1 defense affidavit is a proper, good, you know, competent
2 affidavit. It knocks out -- a term they use, it knocks
3 out the plaintiff's affidavit. Now the plaintiff is
4 screwed and has to spend more money on their case than its
5 worth to try to prove it up, and they're screwed, and so
6 there was an attempt to say in the case where a defense
7 affidavit is not being stricken, it's there, what do we
8 do? How do we -- now what do we do with 18.001?

9 HONORABLE TOM GRAY: How do we preserve the
10 cheap trial?

11 MR. PERDUE: That is not my understanding of
12 where the State Bar committee started from.

13 MR. LOPEZ: That's where it is, and we're on
14 it.

15 MR. PERDUE: That is not where they started
16 from, and that was not the issue they were addressing.
17 The issue they started from was the idea of plaintiffs
18 sneaking in causation language into affidavits.

19 MR. LOW: That's not true, Jim.

20 MR. PERDUE: I have talked to a bunch of
21 people on the committee, Buddy, and you can't -- you can't
22 do that by case law. I mean, that's equally --

23 HONORABLE SARAH DUNCAN: That's how it was
24 presented to us.

25 MR. PERDUE: -- one of the things that --

1 this is another problem with the rule, just there's a
2 comment at the end of it that says if there's superfluous
3 language in the affidavits then that should be stricken,
4 which kind of goes to Justice Duncan's question, is how
5 are we getting into the idea of incompetent evidence
6 becoming competent and a judge essentially having to weigh
7 in on line-by-line of an affidavit, which is, as I read
8 the comment, exactly what may become an issue.

9 CHAIRMAN BABCOCK: Justice Bland has had her
10 hand up patiently.

11 HONORABLE JANE BLAND: You know, I think
12 we've debated this the last two or three meetings, and it
13 sounds to me like people are saying that this Turner vs.
14 Peril case -- which I haven't recently read, but it sounds
15 like it has a scheme for how the statute should work and
16 how the rule should work, and I haven't heard anybody say
17 that that scheme is bad. I've just heard that, you know,
18 not all courts are doing it, so could we draft something
19 more like that instead of trying to --

20 MR. LOW: Yeah, could.

21 HONORABLE JANE BLAND: Instead of trying to
22 maybe do too -- I think we're maybe trying to do too much,
23 and if we just started with something simple like that we
24 would be, you know, more consistent with the statute and
25 less likely to have -- you know, for there to be criticism

1 by either side.

2 MR. LOW: You could be right, but this thing
3 started out before Jim was on this committee, before the
4 chairman of the State Bar was chairman. It started out
5 with the idea that they were getting their doctor bills
6 knocked out by just kind of an objection, "I object, it's
7 not reasonable" by some custodian or something and getting
8 them knocked out. So, therefore, they were having to go
9 -- that's how it started and then the committee went into
10 the question of the counter-affidavit, and it's expanded,
11 but that was the way it started. That was the whole start
12 of this process.

13 Now, you've raised a point that knocks the
14 whole thing to head. If there is a case that says this is
15 substantive, we can't do one thing about it. I don't know
16 of that case. Do you have the case, because I'd like to
17 cite it to them?

18 MR. PERDUE: I have a cite, and this is --
19 I'm always hesitant to cite something that somebody gave
20 me without having done it myself, but --

21 MR. LOW: No, no, no, but I'm certainly
22 interested.

23 MR. PERDUE: It's Rahimi versus U.S., 474
24 Fed. Supp. 2d 825.

25 MR. LOW: 474 Fed. Supp.?

1 HONORABLE SARAH DUNCAN: 2d.

2 MR. PERDUE: Fed. Supp. 2d 825, and I got
3 that by e-mail last night, Buddy, and I need to read it.

4 MR. LOW: Under the Government Code the
5 Supreme Court can't change anything if it's substantive,
6 that ends it, but I would like to answer Sarah's concern.
7 The way the present statute reads, it says the affidavit
8 must be made by -- there's a number of people, the person
9 in charge of records showing the services provided, so
10 forth, so --

11 HONORABLE SARAH DUNCAN: But the statute
12 doesn't make that affidavit admissible into evidence, does
13 it?

14 MR. LOW: Yes, it is admissible unless it's
15 controverted and --

16 MR. LOPEZ: The current --

17 HONORABLE TRACY CHRISTOPHER: The records
18 are admissible, not the affidavit.

19 HONORABLE SARAH DUNCAN: It doesn't say
20 anything about it being --

21 MR. LOW: Oh, okay. I see what --

22 HONORABLE SARAH DUNCAN: It's the
23 "sufficient to support a finding" that concerns me.

24 MR. LOW: Okay.

25 HONORABLE SARAH DUNCAN: Sorry.

1 CHAIRMAN BABCOCK: Okay. Before -- Carlos,
2 go ahead.

3 MR. LOPEZ: I just want to -- because I want
4 to take the -- part of the whole interplay between having
5 the State Bar committee do some of this kind of background
6 work was to try to get the feel of what this committee
7 felt about it, so I want to ask you guys, I want to make
8 sure I understood the sentiment, and then I'm going to
9 take it back there and say, "Look, this is what we're
10 hearing," that -- I'm going to see if I'm accurate here.
11 You guys agree that if the defense affidavit is proper it
12 knocks out the plaintiff affidavit and the plaintiff is
13 left to -- they're going to have to prove up their bills
14 the old-fashioned way. True?

15 MR. AGOSTO: True, by written questions or
16 bringing the custodian or somehow.

17 HONORABLE TRACY CHRISTOPHER: Right.

18 MR. LOPEZ: True. Some way other than
19 18.001.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 MR. AGOSTO: Granted.

22 MR. LOPEZ: Okay. And if that's the
23 preferable approach, regardless of how that may hinder or
24 mess up a plaintiff's costs advantage of 18.001, that's
25 still preferable to the sort of dueling affidavits going

1 back to the jury and setting up that argument that I agree
2 is -- you're going to get, which is "Hey, our affidavit is
3 by a real doctor, their affidavit is by a custodian."

4 MR. AGOSTO: Absolutely.

5 MR. LOPEZ: Okay.

6 MR. AGOSTO: Plus, like the justices said,
7 we're making an affidavit now evidence, which is counter
8 to everything that we've done in trial.

9 MR. LOPEZ: I don't disagree with that at
10 all.

11 MR. AGOSTO: And I really would encourage
12 Buddy and -- the Turner vs. Peril case is the case on
13 point, because as you said, this whole issue started when
14 the defense counsel was just bringing any old affidavit
15 and knocked the affidavits out.

16 MR. LOW: They just kind of object more.

17 MR. AGOSTO: That's exactly what Turner vs.
18 Peril is talking about. It's on point exactly the facts.
19 The objection was done, they brought the affidavit, the
20 affidavit was not qualified, and the court said, "This is
21 the steps you have to follow if you're going to have a
22 counter-affidavit."

23 CHAIRMAN BABCOCK: Okay. We're going to
24 take a little vote here. Everybody in favor of -- I'll
25 call it Buddy's rule.

1 MR. LOW: I've not drafted one word, but I
2 don't carry -- I'm carrying the water, and the more I hear
3 the more I'm --

4 CHAIRMAN BABCOCK: Everybody in favor of the
5 rule that Buddy didn't draft, raise your hand.

6 Everybody opposed? 13 opposed, none in
7 favor. So we'll send that to the Court for its
8 consideration, and I think that takes us to the end of our
9 agenda. Another terrific day.

10 MR. LOW: Could I have -- I did promise them
11 that we would get their version to the Court for whatever
12 consideration the Court --

13 CHAIRMAN BABCOCK: Yeah. I mean, they can
14 send whatever they want to the Court, but thanks a lot.
15 Next meeting is June 8th, and is it at the Bar or here?

16 MS. SENNEFF: I think it's here.

17 CHAIRMAN BABCOCK: We think it's here, but
18 anyway, check the website. Thanks a lot, everybody.
19 We're in recess.

20 (Meeting adjourned at 4:51 p.m.)

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2 REPORTER'S CERTIFICATION
3 MEETING OF THE
4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6
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 27th day of April, 2007, 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 \$ 2,022.75.

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on
17 this the 16th day of May, 2007.

18
19 D'Lois L. Jones
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