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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 JANUARY 28, 2000
10 (MORNING SESSION)
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19 Taken before D'Lois L. Jones, a
20 Certified Shorthand Reporter in Travis County for the
21 State of Texas, on the 28th day of January, A.D., 2000,
22 between the hours of 9:00 o'clock a.m. and 12:30
23 o'clock p.m. at the Texas Association of Broadcasters,
24 502 East 11th Street, Suite 200, Austin, Texas 78701.
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2 CHAIRMAN BABCOCK: Thank you all for
3 coming, and the most important event of the day, of
4 course, is the social hour at 6:00 honoring our former
5 chairman, Luke Soules. So be sure and -- if you don't
6 know about that or didn't get the invitation, be sure
7 to plan to attend that. Bill Dorsaneo claims he has
8 remarks that he wants to make about Mr. Soules, and we
9 will recognize him for that purpose.
10 The first agenda item today is to follow
11 up regarding the Texas parental notification rules and
12 forms that we worked on in our last meeting. I want to
13 try to -- when the Court has taken our recommendations
14 and then finally promulgated a rule I want to see, if
15 the Court is willing, for them to come back and tell us
16 why they accepted certain recommendations of ours and
17 rejected others and inform us about any problems that
18 they encountered in terms of the advice that we're
19 giving them so that we can give them more effective
20 advice.
21 I know I remember being on the committee
22 in past years and seeing something go to the Court and
23 just never hearing anything else about it, and there
24 was a disconnect there, at least for me, that I thought
25 it would be helpful if we tried to establish some

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1 relationship between what we do and then what the Court
2 does with what we do. Justice Hecht has agreed to tell
3 us what the Court thought about our work product in a
4 second, but one thing -- and I think he's also going to
5 tell about a problem that arose with the rules, and I
6 lay this at our doorstep.
7 Our job is to make sure that the Court
8 does not face a situation that was not anticipated or
9 not contemplated. There was a minor glitch with the
10 parental notification rules that we should have
11 spotted. It's understandable that we didn't, but our
12 job is to take these proposals seriously and try to
13 look at them and see if there are systematic or
14 systemic problems with the rules, and we slipped up
15 with the parental notification rules in one, I think,
16 minor respect, but nevertheless, it's a slipup that I
17 hope we don't repeat. So with that said, Justice
18 Hecht, do you want to tell us what the Court's view is
19 of what we did?
20 JUSTICE HECHT: Well, as always we're
21 very grateful to you for your input on the rules,
22 particularly these rules because you had such a short
23 time to look over them, and we had a short time to look
24 at them ourselves, and Justice -- Chief Justice
25 McClure's subcommittee really tried to every time we

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1 needed them to to help us go over not only your
2 changes, but the changes that the Court was concerned
3 about, too, and that subcommittee was extraordinarily
4 well representative of a whole lot of people outside
5 the legal system that deal with these kinds of
6 proceedings, so we felt like we got some good input on
7 the practical side of how the rules would work.
8 The changes, I'm just going to tick
9 through the changes, and I welcome any questions. But
10 the changes that we made, we add an explanatory
11 statement at the beginning of the rules that was not
12 there before, and the second -- the first paragraph
13 tells about why we're doing this, because the statutory
14 basis for it, and the second paragraph talks about the
15 Constitutional reservations that have been raised
16 during the rule-making process and identified issues
17 that the Court did not want foreclosed or to appear to
18 be foreclosed by the adoption of the rules, and among
19 those were whether this process is Constitutional at
20 all or not, whether it can be a secret as the
21 Legislature made it, whether time limits can be imposed
22 the way that they are under the rules and whether this
23 is even a justiciable issue for judges to be ruling on.
24 So we just identified some of those
25 issues in the explanatory restatement. Then we

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1 rearranged Rule 1. A lot of the -- even though it was
2 changed around quite a bit, a lot of the substantive
3 provisions stayed the same. Regarding Rule 1.1 we took
4 the advice of the committee on the use of the word
5 "inconsistency" with the other existing rules and tried
6 to flesh that out, and I think we incorporated the
7 suggestions the committee made there. On Rule 1.2(a)
8 Bill Edwards had correctly observed that it should be
9 "all other pending matters," and we made that change,
10 as the committee voted to do.
11 On Rule 1.2(a) we changed "promptly" to
12 "as soon as possible," consistent with the effort
13 throughout these rules to make sure that everybody
14 understood that all the participants, the clerks, the
15 judges, everybody, that time is literally of the
16 essence because most of these proceedings are on
17 two-day time deadlines, and so we tried to make that
18 emphasis.
19 In Rule 1.2(c) we even defined
20 "instantly," which I didn't think was hard to
21 understand, but you never do know. So we defined
22 "instantly." We divided up the ideas of
23 confidentiality and anonymity and put anonymity in
24 Rule 1.3 and confidentiality in Rule 1.4, and the
25 substantive provisions I think are pretty much what you

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1 saw before, but we separated out those concepts.
 2 In Rule 1.4 we were troubled with the
 3 use of the word "court personnel," the phrase "court
 4 personnel" being bound by the secrecy provisions of
 5 these rules, and as the district judges here know, or
 6 former district judges know, the bailiff and the clerk
 7 do not consider themselves to be court personnel and
 8 the court reporter only does on a good day. So we
 9 wanted to be sure that the sheriff's employees and the
 10 district clerk's employees and the county clerk's
 11 employees all understood that they were part of this
 12 same -- they were bound by these same rules of
 13 confidentiality.
 14 The Court -- I mean, the committee voted
 15 to adopt version A. There were two versions of
 16 confidentiality rules laid out, and basically version A
 17 tracked the statutory provisions and version B had its
 18 own just kind of a separate standing confidentiality
 19 rule and then the third option was not to have anything
 20 at all. The committee voted to do A, and the Court
 21 followed that suggestion. It was changed up a little
 22 bit to make sure that it tracked the statute as closely
 23 as we could, although there are a couple of exceptions,
 24 minor exceptions. The statute doesn't provide for this
 25 clerk's certificate idea if the court doesn't rule,

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1 that you get a clerk's certificate that says the court
 2 didn't rule. So that's an idea that the subcommittee
 3 came up with and we left that in.
 4 On Rule 1.4(d) and (e) the Department of
 5 Regulatory Services or Protective and Regulatory
 6 Services asked that some mention be made of the duty of
 7 participants in this process to report evidence of
 8 abuse, and that is specifically referred to in the
 9 statute, so we took the statutory reference and
 10 incorporated it into those rules.
 11 Rule 1.5 allows for electronic filing.
 12 Most of the time courts or clerks must get permission
 13 from our Court, an order approving their electronic
 14 filing mechanism and procedures, but a lot of clerks in
 15 Texas don't have that, and we wanted to make this a
 16 blanket authorization for these kinds of proceedings
 17 that they could use electronic filing if they wanted to
 18 because, again, time is of the essence, and we
 19 anticipate that a lot of this stuff will get
 20 transmitted from office to office by fax. So that's a
 21 little -- that's a new idea in Rule 1.5.
 22 We also added a provision in 1.5 to
 23 be -- provisions to be sure that confidentiality was
 24 protected as much as possible in the electronic
 25 transmission of documents. So if your idea -- the idea

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1 is that if one clerk is transmitting information to
 2 another clerk, the clerk should call ahead of time and
 3 say, "I'm fixing to send you some stuff. Stand there
 4 and get it and don't just let the fax machine that's
 5 sitting out in the hallway that everybody in the
 6 courthouse uses pick up the materials." But it also
 7 contemplates that if a lawyer is going to send things
 8 by fax to the clerk's office, the lawyer needs to make
 9 that provision ahead of time or else the clerk can't
 10 guarantee that it's going to be confidential.
 11 Rule 1.5 permits a record to be made by
 12 electronic means rather than by stenographic means to
 13 accommodate the rural communities that do not have
 14 immediate access to court reporters on a daily basis.
 15 There are a lot of counties where that's the case.
 16 We took your advice on what is now Rule
 17 1.6, regards recusal of judges. It's a little bit
 18 lengthier than you had before, but I think the
 19 substance is about the same. 1.7 was changed. We only
 20 translated the forms into Spanish, not the rules
 21 themselves, and we also provided in the opening
 22 statement of the forms that you can't file the forms in
 23 Spanish. We even translated the order, the judge's
 24 order into Spanish, but the idea is that the forms will
 25 be used with people who understand Spanish better than

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1 English to give them an idea of what the forms say, not
 2 to substitute for the filing in the court. So you
 3 still have to file the forms in court in English, but
 4 the Spanish translation is to be of help.
 5 Rule 1.8 concerning the duties of
 6 ad litem was added at your request, and I think about
 7 the same as you requested it. Rule 1.9 we caught at
 8 the last minute. Basically the costs that are awarded
 9 in these proceedings are a judgment in essence against
 10 the state. The state is required by statute to pay
 11 them, and at the last subcommittee meeting I asked the
 12 representative of the agency out of whose budget these
 13 payments have to be made what they were going to do if
 14 they got an ad litem bill for \$150,000 for two days
 15 work, and they said they were going to pay it, so they
 16 didn't think they had any choice.
 17 So we gave them a choice here for the
 18 state to appeal an award of costs and basically set up
 19 a little appellate procedure that gives the state the
 20 right to challenge these awards when they're made.
 21 Rule 2.1(b) was added, and we talked about this some,
 22 but we continued to wrestle with it after the last
 23 meeting, and it changed quite a bit, and Rule 2.1(b)
 24 sets up a default procedure if the local courts have
 25 not agreed upon how to handle these cases, and there

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1 has been a lot of work in local jurisdictions on
 2 handling these, and the ones that I'm aware of are
 3 pretty much all different.
 4 I think Harris County agreed to just put
 5 them in rotation like regular cases. Jefferson County
 6 is going to use all district judges. Tarrant County is
 7 going to assign them all to one court, and that judge
 8 is going to farm them out to other judges. So there is
 9 a lot of different suggestions. This rule says if you
 10 don't come up with a local rule, it goes to the
 11 district court first if the active judge is in town.
 12 If not, it goes to statutory county or probate court if
 13 that judge is in town. If not, it goes to the
 14 constitutional county court if that judge is in town,
 15 and if everybody has fled the realm, then it goes back
 16 to the district court for an assignment by the regional
 17 presiding judge. And, of course, the regional
 18 presiding judge can always assign somebody else to any
 19 of these courts to hear the cases if that's necessary.
 20 Rule -- and there's concern, I must say,
 21 the principal complaint that I'm aware of following the
 22 adoption of the rules is that the constitutional county
 23 courts are concerned that while they do not typically
 24 do judicial proceedings in many -- probably most
 25 counties in Texas, they might have this suddenly come

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1 in and nobody knows how to handle it and they're not
 2 equipped to handle it and they don't have court
 3 reporters and ad litem, so they're at a disadvantage.
 4 And so they would rather not be in the rotation, but
 5 the Legislature put them in the rotation, and I don't
 6 think there is anything that can be done about that.
 7 If this doesn't -- if there's something about this
 8 procedure that doesn't work, we'll look at it again,
 9 but it seemed to me that this was the best we could do
 10 under the circumstances.
 11 2.1(b) says that -- also says that
 12 clerks have to work together when these proceedings are
 13 filed. So if the local practice is that these are
 14 going to be handled by the county clerk in the county
 15 courts and it gets filed with the district clerk, it's
 16 the district clerk's responsibility to get it to the
 17 county clerk, not to hand it back to the guy and say,
 18 "Sorry, you're at the wrong office. Go around to the
 19 other side of town." So there's supposed to be -- once
 20 it's tendered to a clerk, the system then is supposed
 21 to take over and make sure that it gets to who it's
 22 supposed to go to.
 23 Rule 2.1(c) was changed. Representative
 24 Dunnam pointed out at the last meeting that the statute
 25 does not require the minor to personally complete or

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1 verify the application, and that's correct, so we
2 changed that so it could be done by a surrogate, who,
3 of course, must be able to make the statements that it
4 requires under oath.
5 Rule 2.1(c), the committee recommended
6 that we take out a statement in the application of the
7 grounds asserted by the minor, but the district judges
8 on the subcommittee wanted the statement in because it
9 would help them in appointing an ad litem so that if
10 the reason were abuse, the judge might pick a different
11 ad litem than he or she would pick if it were some
12 other ground. So it provides the judge a little more
13 information, and when there is such a short time frame,
14 we thought that was a useful thing to have.
15 The Rule 2.4(e) allows witnesses other
16 than the minor to submit testimony by affidavit rather
17 than by personal appearance. So the idea is if a
18 physician or a friend or somebody else wants to weigh
19 in on the application, the minor may have trouble
20 getting them to the courthouse, particularly if it's a
21 physician, and this facilitates hearing that evidence.
22 Also, the rule allows a lot of
23 informality in the proceeding, and the judge could call
24 the doctor and take the doctor's testimony even over
25 the telephone if it were not a question of credibility,

1 intent was pretty clear that they wanted the
2 constitutional county judges in among the people to
3 whom these proceedings could be assigned and could
4 decide them, and we just couldn't -- there was not any
5 way to fix this problem unless if the -- if the
6 constitutional county judge could not work with the
7 district judge to make sure that there were lawyers
8 available if this ever happened in one of those
9 counties and also could not work with the regional
10 presiding judge to make sure that there was a district
11 judge assignable who could be sure that there was an
12 ad litem there, then, I mean, I don't know how else to
13 fix it. There is also concern about court reporters,
14 as I mentioned, but we tried to fix that with the tape
15 recording.
16 CHAIRMAN BABCOCK: Well, it's obviously
17 a minor problem, but we didn't spot it, and we could
18 have saved the Court some embarrassment if we had
19 spotted that problem, and we probably won't spot all
20 the problems, but we ought to try to do the best we can
21 and hopefully have a standard where we're going to spot
22 all these issues so that the Court doesn't have to
23 respond by saying, "We never thought of that because
24 our advisory committee wasn't smart enough." They
25 didn't say that.

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1 but the minor ordinarily has to be present for -- at
2 the time the decision is made.
3 Comment 4 to Rule 2 concerning the
4 duties of ad litem was changed I think pretty much as
5 the committee recommended. The -- Rule 3.1 was changed
6 to specify the contents of the notice of appeal. I
7 don't think the committee had time last time to look at
8 that, but I don't think that's a controversial change.
9 Rule 3.2(b) clarifies the trial court
10 clerk's responsibilities. That's just a clarification
11 requested by the clerks to help them understand their
12 respective roles in all of this. The Comment 3 to
13 Rule 3 deleted -- in Comment 3 to Rule 3 the discussion
14 concerning the standard of appellate review was deleted
15 because the Court felt like that was too substantive
16 for the rules, that the appellate court should just
17 have to work this out and that there was already
18 controversy even in the committee hearings about what
19 the appropriate standard was going to be and how it was
20 going to be applied. So that was deleted, and I think
21 that's not every change that was made, but I think
22 that's the major ones.
23 CHAIRMAN BABCOCK: Judge, as I
24 understand it, there were some complaints from the
25 constitutional county courts in some rural areas

1 JUSTICE HECHT: The constitutional
2 county judges asked to have a representative on this
3 group as a result of all of this, and we immediately
4 acceded to that. I am kind of hard-pressed to remember
5 other instances in the past where they would have
6 wanted to be at the table, but they are certainly
7 entitled to be here, and so we will be having an
8 ex officio, right?
9 MR. PEMBERTON: They are working on
10 figuring out who they are going to send.
11 JUSTICE HECHT: But they will have an
12 ex officio member on this committee.
13 CHAIRMAN BABCOCK: Okay. Before I ask
14 if there are any comments about what Justice Hecht
15 said, be sure that your nameplate is in front of you
16 and pointed at our court reporter. She told me to tell
17 everybody that. Have you got one? There is one back
18 at that table. Anybody have any comments either
19 substantively or in terms of the process of how it got
20 from the subcommittee to us and from us to the Court
21 and back again? Anybody have anything to say?
22 All right. Our next item is to talk
23 about the foreclosure of reverse mortgage rules, and
24 Justice Baker has been quarterbacking that effort with
25 the subcommittee, and I think I'll turn it over to him

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1 pointing out a problem about they were required to
2 appoint ad litem and there were no lawyers in the
3 county.
4 JUSTICE HECHT: Yes. It's amazing how
5 many reasons you can find not to do something you don't
6 want to do, but they do have a legitimate -- there are
7 counties in Texas -- we think there are eight, but we
8 never did actually go count them up. But we think
9 there are eight counties in Texas that have no lawyers
10 in the county who do not work for the government, which
11 is a real challenge for the Bar, I think, to get some
12 people out there, but --
13 MR. SOULES: What for?
14 JUSTICE HECHT: And then there are other
15 counties where there are not very many lawyers in the
16 county, so the constitutional county judge says, "Well,
17 I don't have any way of getting a lawyer here to be
18 involved as an ad litem in this proceeding on this
19 short a notice because there is not even anybody in the
20 county that I could call," but there is a district
21 judge who has more counties in his district, and he can
22 summon a lawyer out of another county to come over to
23 this county and serve as an ad litem.
24 And that's true, but the Court decided
25 finally that we could not -- that the Legislature's

1 if that's all right with him.
2 JUSTICE BAKER: Thank you. James Baker.
3 I don't know if you can see that. Before I introduce
4 Mr. Baggett, who I'm sure most of you know anyway, I
5 wanted to give you a little background. After the
6 general election in 1997 when the people of the state
7 passed the constitutional amendment to allow home
8 equity mortgages, the Court was given the task by the
9 Legislature to draft a rule that would cover
10 foreclosures, and included in that responsibility was
11 the opportunity to appoint a task force to do that job,
12 and so the Court appointed Mr. Baggett and about nine
13 or ten other lawyers in every field we could think of
14 that had to do with mortgages to be the task force and
15 draft those rules.
16 And they did a masterful job because
17 they drafted from scratch the basic rules that you see
18 here that he'll talk about in connection with reverse
19 mortgages within five weeks, and it was through a
20 Christmas holiday situation, and they were approved
21 forthwith and became part of the rules in connection
22 with that new process of home equity mortgages.
23 Well, then of course, as you may know,
24 as a result of the general election in 1999 Texas now
25 has reverse mortgages, and the Legislature was kind

1 enough to give the Court the responsibility to draft
2 the rules for foreclosures of those kind of mortgages,
3 and figured the maxim "don't quit a winner," we went
4 back and asked Mike and the same group to take this
5 task in hand, and they did, and our confidence, was, of
6 course, justified because they did a wonderful job and
7 they finished I think within the first week of January.
8 So, again, in about a five- or six-week period of time
9 they drafted the rules for this particular type of
10 mortgage, and I'll let Mike explain to you how they did
11 it and why it takes this form, but as you know, he's I
12 think still the managing partner or director of
13 Winstead Sechrest & Minick.
14 MR. BAGGETT: I was yesterday.
15 JUSTICE BAKER: What?
16 MR. BAGGETT: I was yesterday. Maybe I
17 am today.
18 JUSTICE BAKER: And he also was last
19 Saturday night inaugurated as the new president of the
20 Dallas Bar Association, and so we were very pleased to
21 have Mike agree that he would head this group, and
22 everybody except two from the last group agreed to
23 serve on this one, and the two that didn't had a
24 conflict and couldn't make the meeting, and they wisely
25 let somebody else take their place. So it's a great

1 of those protections was you have to get a court order
2 to proceed with foreclosure.
3 So what these rules do and all they do
4 is set a procedure in place to obtain that court order
5 to proceed with foreclosure. You still have all the
6 common law obligations and statutory obligations of the
7 cure period before the order ever even comes into play
8 to establish a default. Now, in the middle of the
9 process, so to speak, you have this additional process
10 whereby you obtain an order to proceed with
11 foreclosure, and that's all it is, is an order.
12 After you get the order you still have
13 to give the 21 days notice and all the same process
14 that you have already had for 150 years, so basically
15 what we added or what the constitutional amendment
16 added was a request from the Supreme Court to develop
17 rules to now have an order in the middle of that
18 process, and that's what we did, and the title
19 companies and the mortgage people and so forth said,
20 "Great, we have no problem with the order, but don't
21 create it in a way that it screws up all these -- or
22 messes up" or does whatever description they wanted to
23 say these titles to the property, because the
24 foreclosure process is very important to titles to
25 property and where we are and so forth.

1 deal of pleasure as the liaison that I can introduce
2 Mr. Baggett, and he'll tell you exactly what happened
3 and how.
4 MR. BAGGETT: Thank you, Judge. I will
5 tell you that the group that we had was very
6 broad-based. We had consumer lawyers. We had title
7 company lawyers, because to a certain extent this deals
8 with title to property, and they were all very
9 concerned that we were not going to upset 150 years of
10 title law. You can imagine that. We had mortgage
11 people from the mortgage industry who had worked on
12 this in the Legislature and had worked on the
13 constitutional amendment. So we had a very broad-based
14 group of people on the committee.
15 We also had on the committee the
16 regional counsels from Fannie Mae, which is very
17 important in this. Those of you who aren't familiar
18 with it, these mortgages are all originated, put -- not
19 all of them, but primarily, and put in a pool and sold
20 in the secondary market; and if the secondary market
21 doesn't appreciate the posture that we have, they won't
22 buy them. So to a certain extent you had to deal with
23 the real reality of the marketplace. If we're going to
24 have these interests, we've got to be able to do
25 something with them in the marketplace.

1 So what we did and we had a little
2 discussion, went around the table, "Does everybody
3 agree on that?" Also, do we agree that we want a
4 process that we cannot -- that will not clog the
5 systems up so that if we get into this process and it
6 is uncontested it can be expeditiously proceeded
7 through the court. If it is contested, it just flips
8 over to what I would call regular heads-up litigation,
9 and that's what these rules try to do. If it's not
10 contested, it goes through quick. If anybody wants to
11 contest it, it just flips over and goes into what I
12 would call normal litigation.
13 We had a discussion about it. Colorado
14 has a process very similar to this. There were some
15 people on the committee said, "We're from Texas. We
16 don't want to follow anybody else. We don't want to do
17 Colorado," dah-dah-dah-dah dah-dah-dah. So it took us
18 a long time to talk about whether Colorado was good,
19 bad, or indifferent and whether we could take a process
20 that worked in Colorado and see if we could work it in
21 Texas; and believe it or not, that probably was the
22 most heated discussions we had is whether we ought to
23 take a Colorado process and Texanize it. So hard to
24 believe, but it's true. That gives you an idea.
25 We all had the same goal in mind to try

1 So having all those diverse interests,
2 we started off and we had Judge Wood from Houston on
3 there, who was very good, very helpful, and Judge Baker
4 was terrific. Back in '97 to satisfy the
5 constitutional requirement of a order to proceed with
6 foreclosure, we proceeded to fashion these rules. Now,
7 to give you a little background on foreclosure in
8 Texas, it has for 150 years been nonjudicial. You can
9 have judicial if there is some problem with it, but it
10 is nonjudicial 95 percent of the time so that there is
11 no court involved at all in connection with the
12 foreclosure 99 percent of the time, and you've got
13 different, let's say, bodies of law that effect that.
14 First, when you have a default you've
15 got a series of common law obligations that have
16 developed over time where you've got to send notices
17 and do that sort of thing, a cure period in order to
18 have a default before you can go forward with anything.
19 Once you have a default then you give notice of
20 foreclosure, and you go through that 21-day process and
21 so forth. All of that is nonjudicial, so what happened
22 in the home equity situation when the constitutional
23 amendment was passed by the voters, they put a lot of
24 consumer protections in there and properly so, because
25 all this deals with single family homesteads, and one

1 to get the order but also facilitate the marketplace
2 acceptance of these products. So we did that in '97.
3 These rules have been in place for home equity loans
4 for two years. They have worked extraordinarily well
5 once people understood what the heck they are. So the
6 biggest issue we have had is educating people on this
7 process and what it is. Having the history of two
8 years of working, with really no problems known to us
9 other than the educational process, and most of the
10 educational process is probably with the clerks, and we
11 need to go to their meetings and explain to them what
12 this is and how they deal with it. I think it's more
13 of that than it is anything else, but once you spend
14 time with it we really have almost no problems with it.
15 So we took the rules that were in place
16 that were unanimous from our committee in '97 and
17 presented the Court, were I think unanimous. Again,
18 when we went back and tried to test the market to see
19 where it was, didn't have problems with it, unanimous
20 again. One of the reasons we had to do reverse
21 mortgages again was because the way they were
22 structured in the Legislature/constitutional amendment
23 back in '97, secondary market would not buy the
24 products.
25 So the basic product, the requirements

1 for setting it up, which we're not dealing with at all,
2 were modified somewhat so that there would be a real
3 market for these products, and when they did that they
4 made these changes. They liked I guess -- the
5 Legislature liked what we did last time and in the
6 constitutional amendment again it requires that there
7 is a process set up by the Supreme Court for getting --
8 obtaining an order in the foreclosure process in
9 connection with reverse mortgages. So that's what we
10 did.

11 I don't know how many of you have it in
12 front of you, but Rule 735 and 736, and I think we
13 handed out -- you had them in the package, but we also
14 handed out this morning what shows the only changes we
15 made from 735 and 736 that were in place and working
16 from '97, and they're underlined, and basically all we
17 did was take the old rules, put provisions in there to
18 apply to reverse mortgages where they would be
19 appropriate and went forward, and that really was the
20 only changes we made because we did not find in working
21 with it for two years that there was a problem with it.

22 Those of you who don't have that, I've
23 got some extras here if you don't have it, so let me
24 know, but that's all the committee did this year, was
25 to make the modification to incorporate into 735 and

1 736 the process for reverse mortgages as well as home
2 equity loans. If there's more questions about it, I'm
3 fully willing to go into it however you want to, but
4 basically it is a process. You file an -- well, first
5 you have all of these notices that must be given before
6 this ever starts. Once those notices are given there
7 is a cure period allowing whatever default to be cured.

8 If that hasn't happened, the cure hasn't
9 happened, there is another notice saying there is a
10 default. Then you get to this process. You can't even
11 file the application until those notices have been
12 given and the default has been established, so you've
13 got roughly a, let's say, 30-day period prior to this
14 application ever coming into place. Then you file this
15 application in district court, and there's a form of
16 notice that must be given also in addition to the
17 application being filed, and that's in these rules.

18 And then there is a response date which
19 is 38 days from the time of the service, and we've been
20 asked at least 39 times, "How did you come up with 38
21 days?" The way we came up with 38 days is because
22 there is a Fair Debt Collection Act, a Federal law,
23 that we did not want to walk Texas practitioners into a
24 problem with that. You have 30 days to contest a debt
25 under Fair Debt Collection Act law, Federal law.

1 So what we did is when you file the
2 application you can give a notice at the same time that
3 complies with the Fair Debt Collection Act and lets the
4 borrower contest the law in accordance with that act,
5 so we figured there is a certain several days that
6 you've got to get it. There is the answer period that
7 we normally have and then we put some extra days on the
8 end to make sure we gave enough time that there could
9 be contesting under the Fair Debt Collection Act.

10 That's not in here, but it's to allow
11 lawyers to do that without running into those problems,
12 so that's why there is a 38-day answer period, more
13 than there normally is, and we understand that. But
14 once you have that, this is -- this process, it's like
15 a forcible entry detainer for possession in JP court.
16 There is no discovery, no document production. It's
17 not res judicata. It's not collateral estoppel. It is
18 nothing but obtaining an order that says you can go
19 forward with foreclosure.

20 So this process anticipates that there
21 will probably be defaults in most of this because
22 that's where it is, and if there is, this order will be
23 given. If at any time a borrower wants to contest any
24 aspect of it, they can file a lawsuit in district
25 court, file a notice of that lawsuit in this

1 application process. This application then is
2 automatically dismissed without prejudice. It's
3 automatically dismissed, and you just flip over to what
4 I would call normal litigation.

5 So that's really all it is, is a
6 streamlined process to expeditiously receive this
7 order. If anybody wants to contest it, we just go at
8 the regular heads-up litigation and then thereafter
9 once the order is obtained you have to give the same
10 notices you were giving beforehand. One of the issues
11 that we always have is what the heck is a reverse
12 mortgage. That's probably not really what these rules
13 are about, but I'll just say something about what a
14 reverse mortgage is. A reverse mortgage is -- this is
15 the market view of the reverse mortgage as opposed to
16 these rules, and you can cut me off --

17 CHAIRMAN BABCOCK: No, go ahead.

18 MR. BAGGETT: -- as soon as you want me
19 to because they probably don't want to hear a whole lot
20 about reverse mortgages, but what a reverse mortgage is
21 is a single family homestead, and if you have elderly
22 people that have paid their home off or they have
23 equity in their home but they don't have enough money
24 to live, they'd have to sell their home in order to
25 have some money, this product has been established all

1 over the country. You have to be 62 years old to get
2 it. What you do is you go in, and you apply to the
3 mortgage company for a reverse mortgage.

4 They go in and they evaluate the equity
5 in the home, could be a first lien on it, but it may be
6 paid off, and they will make you a loan based upon the
7 equity in that home, and they will do it actuarially,
8 and once you do that they will have a lien on it. You
9 can elect to take it in a lump sum or pay it off for
10 the remainder of your life. If it's a husband and a
11 wife it can be continued to be paid until the last
12 survivor is around. So it's a vehicle to get liquidity
13 to elderly people in their house if they want it.

14 You don't make any payments on it. It's
15 interesting to have a mortgage you make no payments on.
16 The events of default, for lack of a better term, are
17 both spouses die. Once they die then it's paid off in
18 the estate process. Another one is they sell it. If
19 it's sold, it has to be paid off, and then there is a
20 couple of other ones that if there's liens against the
21 property that affect the title that aren't -- that can
22 be contested, but they aren't contested, that could be
23 a basis for it.

24 Another one is if you move out of the
25 property for 12 months and you leave and you're no

1 longer occupying it. That's another basis for, quote,
2 default. It is in those latter circumstances where
3 there is a lien against the property that affects the
4 title and may affect the rights in the property or they
5 move for 12 months that you have to give these
6 additional notices so they'll know what's happening.

7 If they live there and there's no lien
8 against the property, there are no payments, and that's
9 the way a reverse mortgage works. So what we did is
10 took home equity, the process that we had, incorporate
11 home equity into that and proceeded forward. It was
12 very straightforward and really had very little issues
13 with it, even though we had a bunch of consumer
14 lawyers, mortgage companies, title companies,
15 et cetera, et cetera.

16 CHAIRMAN BABCOCK: Yeah, well, you
17 haven't dealt with this committee yet.

18 MR. BAGGETT: Okay.

19 CHAIRMAN BABCOCK: Everybody should have
20 the interlined Rule 735 and 736. We had previously
21 sent you in the package both the 735 and 736 and the
22 statute that is referenced in these provisions. I
23 think Mike's point is a good one to keep in mind. We
24 are not creating a Rule 735 and 736 in the form out of
25 old cloth. We are merely adding the references to

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1 certain reverse mortgage foreclosures and incorporating
 2 those references into the rules. So we're not creating
 3 something new here, just broadening the applicability
 4 of existing rules.
 5 Mike, the way we have done this, at
 6 least the last meeting, the subcommittee chair, which
 7 would be you, has the opportunity to accept or reject
 8 friendly amendments or changes that are suggested by
 9 this committee and then we forward that information on
 10 to the Court. I'm not sure that there's going to be a
 11 lot of controversy about this, but I may be surprised.
 12 So with that in mind, Justice Baker.
 13 JUSTICE BAKER: I just wanted to comment
 14 before discussion that I am the liaison of the Court to
 15 this task force, and it's been my intention to
 16 recommend adopting these rules as-is unless this
 17 committee messes them up.
 18 CHAIRMAN BABCOCK: Bill Dorsaneo.
 19 PROFESSOR DORSANEO: Well, to start on
 20 that process, you know, there are some matters of form
 21 that we don't really need to worry about, but Mike, I'm
 22 looking here over here on page seven of the handout
 23 draft, and in Item No. 7 where it says "only issues" --
 24 MR. BAGGETT: Right.
 25 PROFESSOR DORSANEO: Then there are two

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1 subparagraphs or paragraphs. That seems to be the only
 2 place that talks about being able to come in afterwards
 3 and to seek relief in any court of competent
 4 jurisdiction if an application has been granted, you
 5 know, let's say by default. Is that right?
 6 MR. BAGGETT: Once an order is signed,
 7 that's correct.
 8 PROFESSOR DORSANEO: Don't you think it
 9 would be better if the information, particularly in (b)
 10 and particularly in the first sentence of (b), would be
 11 split out under a separate numbered paragraph, and
 12 there is a paragraph 9, abatement and dismissal.
 13 MR. BAGGETT: Right.
 14 PROFESSOR DORSANEO: Which is, you know,
 15 not the same thing, but it's in the same, you know,
 16 general area of, you know, what happens to this Rule
 17 736 proceeding. If it gets off -- you know, if it gets
 18 off the track because it's a contested matter, it gets
 19 into heads-up litigation, and it just really seems to
 20 me that that paragraph, "only issue," talks about a lot
 21 more than that. The "only issue" part of it is in the
 22 first sentence in (a). Then, you know, thereafter it
 23 goes on to talk about the effect of the determination
 24 of that "only issue" and the preclusive effect of it on
 25 the parties affected by the determination, right? And

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1 if that's so, that needs to be put somewhere else
 2 because it's buried here, and where I would suggest
 3 that it would be put would be in a separate paragraph
 4 that could be 10 or whatever number that ends up being.
 5 You know, 736.10, perhaps. You understand what I'm
 6 saying?
 7 MR. BAGGETT: Yes.
 8 PROFESSOR DORSANEO: That's my
 9 suggestion as a matter of organization, and I'd also
 10 have further suggestions about how to talk about the
 11 order not having any preclusive effect, but I think we
 12 could leave that to drafting. I mean, it doesn't need
 13 to say "estoppel by judgment" and "collateral estoppel"
 14 because that's redundant, and perhaps some other
 15 language that simply would say that there's no
 16 preclusive effect, you know, be it beyond the effect
 17 that the order would have under this rule, okay, would
 18 be adequate.
 19 CHAIRMAN BABCOCK: Can I ask Mike a
 20 question? Mike, is 7(a), which Bill has been talking
 21 about, that is in the existing rule, is it not?
 22 MR. BAGGETT: The existing rule is -- we
 23 have not done anything. That's the existing rule as it
 24 stands.
 25 PROFESSOR DORSANEO: But I would point

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1 out to the chair that the existing rule did not get
 2 seminareed through this committee.
 3 MR. SOULES: That's right.
 4 MR. BAGGETT: That is correct. Yeah.
 5 It was presented to the Court, but you're right, it did
 6 not go through.
 7 JUSTICE HECHT: And we didn't have time.
 8 They were passed. Mortgages were starting to be
 9 issued, and we were on a -- it was fast-tracked.
 10 MR. BAGGETT: That's correct. We had,
 11 what, five weeks to do it.
 12 CHAIRMAN BABCOCK: Justice Duncan.
 13 HONORABLE SARAH DUNCAN: Following up, I
 14 agree with what Bill said, and to me where those things
 15 ought to be and what concerns me most about the rule is
 16 that they come too late. To me a stand-alone lawsuit,
 17 whether it's a usury or fraud or whatever it is, it is
 18 in the nature of a response; and these things ought to
 19 be, it seems to me, in the response section to alert
 20 the practitioner that this is also a viable response;
 21 and if you file a stand-alone lawsuit and a notice in a
 22 foreclosure suit there will be an automatic abatement
 23 and dismissal.
 24 MR. BAGGETT: Well, in response, the
 25 first sentence of 4(a) says, "The respondent may file a

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1 response setting out as many matters, whether of law or
 2 fact, as respondent deems necessary or pertinent to
 3 contest the application," and we did that for that
 4 reason. You can say whatever you want to say in the
 5 response, period. We wanted to let them know that. I
 6 think your point's well taken, but that's why we tried
 7 to say that.
 8 HONORABLE SARAH DUNCAN: And that's why
 9 I would put the abatement and dismissal part there,
 10 because to be able to put it in a response and it have
 11 no effect isn't very comforting to me, but if I know
 12 that I can not only put it in a response, which I
 13 really wouldn't want to do, I would want to go file my
 14 stand-alone lawsuit and just get the foreclosure
 15 proceedings.
 16 CHAIRMAN BABCOCK: Justice Baker.
 17 JUSTICE BAKER: Mike pointed out and
 18 when you look at these carefully, this process is not
 19 contemplated to be a full-blown lawsuit, which he
 20 commented on several times; and although I understand
 21 your concern, it seems to me that this process by these
 22 two rules is to limit it to exactly what's being
 23 required; and that is an order. And as soon as you say
 24 in the response, "I disagree and I'm going to file a
 25 lawsuit," you have to file a separate suit.

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1 In other words, we don't contemplate by
 2 these rules that you're going to have the full-blown
 3 lawsuit operating within the framework of this
 4 application for an order. It's going to be a separate
 5 piece of litigation, as he said before, and so your
 6 comments I think are well-taken, but the answer is
 7 already there, as he says. You're not going to
 8 litigate usury or fraud or whatever in this process.
 9 HONORABLE SARAH DUNCAN: I understand.
 10 My only point is that I think you need to alert the
 11 practitioners at that sequence in time that, in fact,
 12 they have the remedy available in subsection 9, which
 13 is to file the stand-alone lawsuit and have the
 14 foreclosure proceeding automatically be dismissed.
 15 CHAIRMAN BABCOCK: If I could ask
 16 Justice Baker a question. Justice Baker, is it the
 17 desire of the Court that this committee study the
 18 entire Rule 735 and 736 rules, I should say, in light
 19 of the fact that there was not time for this committee
 20 to study it before, or are you asking for our advice
 21 only on the interlined portion of the two rules that is
 22 in this handout that you gave us?
 23 JUSTICE BAKER: Well, my personal
 24 viewpoint is because of the circumstances of the first
 25 go-around and the fact that the initial rule as

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1 promulgated by the Court has been in effect for two
2 years without any problems having developed, that I
3 would prefer that the group look at it for purposes of
4 integrating the reverse mortgage part rather than
5 contemplating this discussion as a full-blown redo, if
6 you will, of the substantive rule itself. You know,
7 with all due respect to what your function is and what
8 you-all do, it's only been two years, but it doesn't
9 appear to be broken. I would just leave it like it is
10 unless you think there is a real substantive problem
11 with it.

12 CHAIRMAN BABCOCK: Yeah. I think it
13 might be helpful to ask the committee if they are aware
14 of any problems. Mike, you're not, and Mike's not --
15 Luke, do you have something?

16 MR. SOULES: I think the notice
17 provision in paragraph 2 is unconstitutional.

18 MR. BAKER: Well, sue us.

19 MR. SOULES: We worked long and hard, we
20 worked long and hard on Rule 117a, which gives
21 ad valorem tax delinquency collection people some
22 special ways to meet constitutional requirements where
23 they can't find the people and what have you; and this,
24 just to mail to the person whose record or whose name
25 and address is in the records of the lender a letter, I

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1 don't think that's enough.

2 MR. BAGGETT: Luke, let me tell you
3 where that came from, and I understand your issue, and
4 we had a lot of discussion about that in the committee,
5 because let me tell you, the people -- the title
6 company people were more concerned about that than you
7 are because if there is some problem with the service
8 it creates a problem with the title.

9 MR. SOULES: Well, they have got it.

10 MR. BAGGETT: So we spent a lot of time
11 working on that. Where this came from is that's the
12 exact, exact service requirements that are in 51.002 of
13 the Property Code of the notices you are required to
14 give for foreclosure. That's exact, just right out of
15 the code. The code has been contested on the
16 constitutionality of those notices, and it's been
17 upheld that those notices are constitutional. Now,
18 whether the same language has been upheld in that
19 statute that would be here, maybe, I don't know, for
20 some reason it's typed different or something, I don't
21 know, but basically -- or maybe the arguments weren't
22 made, but the constitutionality of that notice under
23 51.002 has been upheld.

24 CHAIRMAN BABCOCK: Yeah, Carl.

25 MR. HAMILTON: Can you explain what the

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1 "certain reserve reverse mortgages" are and which ones
2 are excluded?

3 MR. BAGGETT: Yes. Under the statute or
4 the constitutional amendment, excuse me, there are four
5 bases of, quote, default. I mean, it's not default in
6 your normal sense. One of them is that both spouses
7 die. One of them is that the property is sold. Under
8 those two circumstances the constitutional amendment
9 did not require an order be obtained. The third one
10 is, is that there is some lien against the property
11 that affects the mortgage against the property, and the
12 fourth one is that somebody moves from the property for
13 12 months and is no longer occupying it. In those last
14 two, one of which as long as the lien is contested you
15 can't go forward, but those last two circumstances are
16 the only two circumstances under which you have to get
17 an order. You do not have to get an order for the
18 first two.

19 Yes.

20 CHAIRMAN BABCOCK: Bill.

21 PROFESSOR DORSANEO: Mike, going back to
22 my point, do you have any problem letting out that
23 preclusive effect and related language from paragraph
24 7, the "only issue" paragraph, which I think all of you
25 who look at it will recognize talks about a lot more

1 than the "only issue," okay, and putting it in a
2 separate paragraph? Even though that's a new matter, I
3 picked out the one thing in this rule that's important
4 that's articulated in an opaque way. I didn't raise
5 every other issue that could be raised. I'm asking for
6 one bite at this to get it into the shape that it needs
7 to be in to be comprehensible, and I'd ask my fellow
8 committee members to take a look at that and to tell me
9 that I'm dead wrong if I'm dead wrong; but if I'm right
10 then I'm asking for Mike to tell me whether he thinks
11 that's a good idea or not.

12 That's the last thing I'm going to say
13 about it. If all we're going to do is to say that the
14 rule we didn't discuss is good enough for reverse
15 mortgages, I'm ready to vote, because all of these
16 crossreferences now to reverse mortgages, that's all it
17 amounts to, if that's all we're doing.

18 MR. BAGGETT: Let me respond to you this
19 way, and really it's the way Judge Baker addressed it.
20 I think we could all speculate on whether moving that
21 would make it more meaningful. My view is that with 9
22 stand alone, if you want to do anything about it, you
23 just file a lawsuit and it's gone, period, is as good a
24 protection as you can ever get. And if you want to
25 know, we had a lot of discussions about that, whether

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1 or not that's enough protection just to flip it out and
2 do away with all this. It has worked for two years.

3 I don't think there is a problem with
4 it, so if we are really just looking at the rule and if
5 there is any problems develop addressing those, that
6 might be one, but there have been no problems, has not
7 been misunderstood, and I think if it's already been
8 there for two years. Even though it didn't go through
9 this committee and it's working, we ought to sort of
10 leave it alone.

11 CHAIRMAN BABCOCK: So to put it another
12 way, you would not accept the friendly amendment from
13 Professor Dorsaneo.

14 MR. BAGGETT: I think that's my
15 preference would be to not do that.

16 CHAIRMAN BABCOCK: Let me get back to my
17 question. Yeah.

18 MR. YELENOSKY: Well, I don't know about
19 Professor Dorsaneo's point, but on the point as to
20 whether it's been working well or not, Judge Duncan's
21 point and Luke Soules' point were as to notice.

22 MR. BAGGETT: Right.

23 MR. YELENOSKY: And I don't know how we
24 could know whether it's working or not unless we knew
25 if people had misunderstood the notice or hadn't gotten

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1 notice and therefore had lost their homes as a result.
2 So I just don't want it to go unsaid that I don't
3 believe we could conclude based on what I've heard that
4 it's been working well from the perspective of someone
5 who didn't get adequate notice.

6 CHAIRMAN BABCOCK: Yeah. Good point.

7 If you don't have notice you can't --

8 MR. SOULES: Apparently the title
9 company and the industry is willing to assume it's
10 working well.

11 MR. BAGGETT: That's right, and they're
12 assuming to give title policies, but they work. We had
13 a big long discussion about that and whether they're
14 going to issue title policies or not issue them based
15 on that notice issue, and trust me, they spent a lot of
16 time talking about that, and since it's the exact
17 notice that we had otherwise they went ahead and did
18 it.

19 Now, you are correct. I mean, who knows
20 how long it will take for all of this to bubble up. I
21 don't know that, but to the extent things have bubbled
22 up, it's been fine.

23 CHAIRMAN BABCOCK: Let's see if we can
24 bring closure to whether anybody is aware of any
25 problems. Bob Pemberton, are you aware of any letters

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1 that you have received on 735 and 736?
 2 MR. PEMBERTON: We haven't received
 3 anything, and the only thing I've even heard is some
 4 practitioner at a CLE in Houston mentioned that he
 5 didn't like the fact that if you wanted to contest one
 6 of these you have to file a separate lawsuit. That's
 7 just a policy decision that's pretty fundamental.
 8 That's all I've heard.
 9 MR. BAGGETT: Let me tell you why we did
 10 the separate lawsuit instead of having -- and if you
 11 think about it, the way you stop a foreclosure is you
 12 go in and get a temporary restraining order, an
 13 injunction, and you hear it. We really didn't want
 14 them to have to do that. We did not want to go through
 15 the situation where they had to get a T.R.O. and a bond
 16 and all that sort of thing. We wanted them to have an
 17 ability just to file an application, and it's
 18 automatically stopped, and the thing is abated, and
 19 you're automatically in litigation because you can't
 20 proceed with a foreclosure without an order.
 21 So if you don't get the order we've
 22 really bent over backwards to go the other way, and
 23 some people would say, "Yeah, you've encouraged more
 24 litigation." Well, no, we're not trying to do that,
 25 but we're allowing them to stop it without a T.R.O.,

1 problem here, and that is that the way you set up
 2 notice here the response time is really 41 days under
 3 the rules because you've got to add three days to
 4 certified mail service any time you do it that way. So
 5 anybody that's taking a default judgment on the 38th
 6 day is automatically taking a judgment prior to the
 7 time the response is due.
 8 MR. BAGGETT: Well, I understand your
 9 point, and it's a good point, but that's part of why we
 10 added the eight days to the 30 days, but I know.
 11 MR. SOULES: That still doesn't take it
 12 out of Rule 21a.
 13 MR. BAGGETT: I understand. I'm not
 14 disagreeing with you, but that's part of the basis
 15 of -- the Fair Debt Collection Act is 30 days. We
 16 added this to deal with that, but your particular point
 17 I understand.
 18 MR. SOULES: Okay.
 19 PROFESSOR DORSANEO: What number of days
 20 would it be if you just picked a number of days and
 21 forgot about the Monday next, which in our
 22 recodification draft we have eliminated? Okay. What
 23 number of days would be the right number of days if you
 24 just wanted to give the right number of days?
 25 MR. BAGGETT: You need to give the --

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1 without a bond, without anything other than just filing
 2 an application -- a lawsuit.
 3 CHAIRMAN BABCOCK: Elaine.
 4 PROFESSOR CARLSON: Would you consider
 5 adding a comment to Rule 735 to the effect that
 6 Rule 735 and 736 do not address or purport to change
 7 the common law duty of a lender seeking foreclosure,
 8 nor do the rules preclude a debtor from proceeding in
 9 district court to contest the right to foreclose under
 10 Rule 736, subsection 9? That kind of tells a lawyer up
 11 front here is your menu of choices and duties that
 12 exist independently of the rules.
 13 MR. BAGGETT: That would be -- I mean,
 14 if that solves the problem to make sure they know they
 15 can do that better, I don't have a big conceptual
 16 problem with that.
 17 CHAIRMAN BABCOCK: Okay. We'll talk
 18 about that in a second. Anybody else aware of any
 19 problems with Rule 735 or 736?
 20 Justice Hecht, while you were out of the
 21 room we had a brief discussion about whether or not the
 22 Court was interested in our taking on the entire rule
 23 rather than just these few changes, and Justice Baker's
 24 view was that the rule was working fine and that it was
 25 not his thought that we should try to examine the

1 you need to have the 30 days so that the practitioners
 2 won't have the Fair Debt Collection Act problem and
 3 then what Luke is talking about.
 4 PROFESSOR DORSANEO: Give me a number.
 5 40, 50?
 6 MR. BAGGETT: 40 is fine. I mean, it's
 7 not -- it just has to be over 30 with some leniency on
 8 the notice issue.
 9 CHAIRMAN BABCOCK: Any other comments
 10 about these rules other than the ones we have talked
 11 about? And we have got Elaine's comment about the
 12 rules pending. Anything else?
 13 PROFESSOR DORSANEO: Well, I'm going to
 14 move to split out the language from the "only issue"
 15 paragraph and put it in a separate paragraph 10 that's
 16 called "preclusive effect" or words to that effect
 17 because paragraph 9 is about abatement, and from my
 18 standpoint something that's ongoing is abated, but the
 19 ability to come back in and challenge an order later,
 20 you know, is a distinct matter.
 21 CHAIRMAN BABCOCK: Okay.
 22 MR. SOULES: May I ask a question? Are
 23 we against a deadline here where this rule has got to
 24 be enacted?
 25 JUSTICE BAKER: We're past it.

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1 entire rules, notwithstanding the fact that because of
 2 the timing they hadn't gone through this committee
 3 previously, and I was trying to canvass the group to
 4 see if there were any problems with those rules that
 5 anyone was aware of.
 6 JUSTICE HECHT: Okay.
 7 CHAIRMAN BABCOCK: So we have the
 8 comment suggestion. Anybody else aware of problems?
 9 Yeah, Bonnie.
 10 MS. WOLBRUCK: I just wanted to make a
 11 comment that in my county, in Williamson County, we
 12 have just in the last few months started receiving
 13 these applications. Although the procedure has been in
 14 place for a couple of years we have just now in the
 15 last few months started receiving them.
 16 CHAIRMAN BABCOCK: So if there were
 17 problems, they would have just started to arise?
 18 MS. WOLBRUCK: They would have just
 19 started.
 20 CHAIRMAN BABCOCK: But you're not aware
 21 of any right now?
 22 MS. WOLBRUCK: I don't know of any
 23 problems at this time.
 24 CHAIRMAN BABCOCK: Okay. All right.
 25 MR. SOULES: I guess there is one other

1 MR. BAGGETT: We're past it, yeah. We
 2 have the same --
 3 JUSTICE BAKER: Time problem.
 4 MR. BAGGETT: -- time problem as we had
 5 last time.
 6 CHAIRMAN BABCOCK: Bill has got a motion
 7 on the floor. Anybody second that motion?
 8 HONORABLE SARAH DUNCAN: I second it.
 9 CHAIRMAN BABCOCK: Elaine seconds it.
 10 Now, as I understand it, the chair of the subcommittee
 11 has not accepted it, so what we are going to do now is
 12 vote on it, and if it passes then we will inform the
 13 Court, and Pemberton will accurately report our vote on
 14 that matter. Yeah, Mike.
 15 MR. BAGGETT: Let me say this. If we're
 16 going to make some changes to it, that change that
 17 you're suggesting doesn't give me great pause. I guess
 18 the issue is if we're just going to keep it like it is,
 19 would be my preference, but if we're going to make some
 20 changes, I don't have a big problem with what you're
 21 saying. That doesn't bother me much.
 22 PROFESSOR DORSANEO: My motion,
 23 Mr. Chairman, is just simply to move three sentences.
 24 CHAIRMAN BABCOCK: Right. Motion to
 25 move three sentences. How many are in favor of the

<p style="text-align: right;">Page 516</p> <p>1 motion to move three sentences? 2 16. A late vote, 17. I get 17. Is 3 that what you got Carrie? 4 MS. GAGNON: Yeah. 5 CHAIRMAN BABCOCK: Okay. 17 in favor. 6 Who is opposed? 13 opposed. So that carries. And 7 Mike you accept it or don't? 8 MR. BAGGETT: I'll accept it, and I will 9 also accept the one on the clarification of 735. Now, 10 I don't know mechanically, Judge Baker and Judge Hecht, 11 our committee has technically expired, I think. 12 CHAIRMAN BABCOCK: Well, it sounds like 13 that this is not a change in substance. It's just a 14 reorganization. 15 MR. BAGGETT: Right. 16 CHAIRMAN BABCOCK: Bill, would you 17 agree? 18 PROFESSOR DORSANEO: Yes. 19 CHAIRMAN BABCOCK: So -- 20 JUSTICE HECHT: But Elaine had a 21 comment. 22 CHAIRMAN BABCOCK: Yeah. And Elaine has 23 got a comment. We'll get Elaine's comment in a minute. 24 JUSTICE BAKER: I think that it's a 25 matter of drafting, and I guess the regular procedure</p>	<p style="text-align: right;">Page 519</p> <p>1 in '97 it was effective January of '98. This one was 2 effective January 1, 2000. So we were operating on a 3 kind of a strained schedule. We didn't want to appoint 4 anybody until the actual constitutional amendment time 5 said you could do it, so we had about five weeks to do 6 the whole thing, and the theory is that the rule is 7 supposed to be in place on January 1. Well, the 8 reality is, of course, that you can't do a reverse 9 mortgage until January 1. 10 It's hardly feasible that someone is 11 going to make one and try to foreclose in the first 30 12 days. So practically we have or did have a time period 13 to finish it, which is what we did in the first 14 go-around, and we felt compelled because of the 15 Legislature's mandate to do it as rapidly as possible 16 and with as few many days expired in January as 17 possible, so here we finished about three weeks ago, I 18 think, wasn't it, Mike? 19 MR. BAGGETT: Right. Right. 20 JUSTICE BAKER: And so we delayed to 21 this point merely because this body was not meeting 22 until today. 23 CHAIRMAN BABCOCK: Justice Baker, could 24 I offer a suggestion? 25 JUSTICE BAKER: Sure.</p>
<p style="text-align: right;">Page 517</p> <p>1 is that whoever has got this in their word processor 2 will move the second sentence of (a), all of (b), and 3 make it number 10 on page eight, and so far as that 4 goes we'll recirculate it to this group. Isn't that 5 the ordinary procedure? 6 MR. BAGGETT: What I would do if it's 7 not objectionable is I would like to get with you, 8 Elaine, on your suggestion. 9 PROFESSOR CARLSON: Sure. 10 MR. BAGGETT: And with Professor 11 Dorsaneo's suggestion and get something to them that's 12 okay with them and then probably set up our committee 13 just to look at it. I think it would be appropriate to 14 do that and report back, if that would be okay. Is 15 that all right? 16 PROFESSOR CARLSON: Fine. 17 MR. BAGGETT: Okay. 18 MR. SOULES: If you're going to do that, 19 I think this rule ought to be looked at for its 20 conformity to the other rules and made to conform. 21 Once we pass it through this committee it's got 22 problems whenever you try to square it with the other 23 Rules of Civil Procedure. If we've got to pass it 24 today, we do in order to meet deadlines or meet 25 deadlines that are past. If we don't have to pass it</p>	<p style="text-align: right;">Page 520</p> <p>1 CHAIRMAN BABCOCK: And that is -- and, 2 Luke, see if this works for you. We will forward the 3 work that we've done this morning to the Court, and 4 that is blessing the work of Mike's subcommittee, 5 making the two changes, the one that Bill Dorsaneo has 6 suggested and if Elaine can come up with some comment 7 language that is acceptable to Mike and to the 8 subcommittee -- I mean to this committee -- we'll 9 forward that on to the Court and then at some later 10 time when we have more time we can put Rule 735 and 736 11 on the agenda for full consideration by this committee. 12 And I would suggest that we let a little 13 air go underneath this. As Bonnie says, we're just 14 starting now to see these percolate through the system. 15 If there are problems that are going to manifest 16 themselves, it's probably going to be a few months down 17 the road. So I would propose a kind of bifurcated 18 approach to it. Let's give the Court what it needs 19 today because it's under a deadline and defer the 20 full-blown treatment that this committee is capable of 21 giving to a rule to a later time. 22 MR. SOULES: I move we approve the 23 amendments but not the rule. 24 CHAIRMAN BABCOCK: Okay. 25 MR. SOULES: We have never been asked to</p>
<p style="text-align: right;">Page 518</p> <p>1 today, I think that the committee ought to try to 2 square this rule up with the other Rules of Civil 3 Procedure so it really fits with the overall practice 4 and doesn't conflict or at least doesn't conflict with 5 the other practice. So it's going over to the next 6 meeting anyway, I think we ought to at least try to do 7 that. 8 CHAIRMAN BABCOCK: Well, it's whatever 9 the Court wants, but my thought was that we would take 10 Bill's change, and Mike would put that on his word 11 processor, and Elaine would work on her comment right 12 now, and we would talk about that today and forward it 13 on to the Court speedily; but again, Luke, you make a 14 good point. If this committee is charged, or put 15 another way, we're going to be blamed for not having 16 looked at these two rules, then that's another matter. 17 What I hear the Court saying is that they don't need us 18 to, but -- 19 JUSTICE HECHT: Well, what is the 20 timing? I just don't know what the time constraints 21 are. 22 JUSTICE BAKER: Well, the theory was 23 exactly like the first go-around, that the statutory 24 implementation of the constitutional amendment was 25 effective January 1 of the next year. In other words,</p>	<p style="text-align: right;">Page 521</p> <p>1 approve the rule. We have just been asked to approve 2 the amendments. If this committee is going to approve 3 the rule we need to study it in an appropriate way. 4 CHAIRMAN BABCOCK: Okay. 5 MR. SOULES: So my motion is that we 6 approve the amendments without inferring or in any way 7 expressing -- 8 CHAIRMAN BABCOCK: What do you want to 9 do about Dorsaneo's amendment? 10 MR. SOULES: With that change. 11 CHAIRMAN BABCOCK: With that change, and 12 what about Elaine's comment? 13 MR. SOULES: Whatever. I think it's a 14 good comment. 15 CHAIRMAN BABCOCK: Is everybody in favor 16 of doing that? Who is in favor of Luke's motion, which 17 I'll second? 18 I got 28. Anybody opposed? Okay. 28 19 to nothing. So that's what we're going to do, but, 20 Elaine, you're going to have to come up with some 21 language, talk to Mike about it, and then get back to 22 us today before lunch. 23 MR. BAGGETT: I'll stay. 24 CHAIRMAN BABCOCK: Huh? 25 MR. BAGGETT: I was just telling them</p>

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1 I'll stay, and we'll work on it.
 2 MR. WILLIAMS: One thing on Professor
 3 Dorsaneo's comments about the rule not fitting in
 4 accord with the other rules, would it be an imposition
 5 on you to give an outline to the committee on how it
 6 doesn't fit? You indicated --
 7 MR. ORSINGER: That was Luke's comment.
 8 MR. WILLIAMS: Oh, I'm sorry, Luke.
 9 MR. SOULES: Sure.
 10 MR. WILLIAMS: You said it didn't fit.
 11 MR. SOULES: I will undertake to do
 12 that, enlist anyone else's help that will take a look
 13 at this in light of Rule 4, Rule 21a, and the citation
 14 rules. I know that those need to be looked at for
 15 inconsistencies or consistencies with 735 and other
 16 rules that are here being proposed. There may be
 17 others as well. I'll be happy to do that. I think
 18 maybe I'll get Bill, Steve, or somebody else to take a
 19 look at it. Anything that you-all see, please drop me
 20 a line or give me a voice mail or something so that
 21 when we do this we will have it thoroughly prepared for
 22 your review.
 23 MR. BAGGETT: Let me comment. Obviously
 24 we did not want to interfere with the context of the
 25 rules otherwise, and so it wasn't our intent to do

1 should do them one at a time.
 2 PROFESSOR DORSANEO: Does everybody
 3 have -- in the agenda there are -- what are they
 4 called, Bob, enclosures?
 5 CHAIRMAN BABCOCK: Right.
 6 PROFESSOR DORSANEO: The enclosure to
 7 agenda --
 8 CHAIRMAN BABCOCK: No. 3.
 9 PROFESSOR DORSANEO: 3. Is that right?
 10 Yes. Proceeded by Judge Womack's letter and then on
 11 Bates stamped page 240, which is the second page
 12 following that letter, what the judge is talking about
 13 now is at the bottom of the page.
 14 CHAIRMAN BABCOCK: This is Rule 67,
 15 67.1, dealing with, "By the vote of at least four
 16 judges the Court of Criminal Appeals may," and then
 17 there is some language that is proposed to be deleted.
 18 MR. SOULES: I so move.
 19 PROFESSOR DORSANEO: Second.
 20 CHAIRMAN BABCOCK: Any discussion? All
 21 in favor? By acclamation. What's the next one, Judge?
 22 HONORABLE PAUL WOMACK: Next in
 23 connection with Rule 42, it's been the rule forever in
 24 criminal cases that for an appeal to be dismissed the
 25 appellant had to personally ask for the dismissal, that

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1 that, and if there is some issues there we would have
 2 no problem with making them consistent. That's fine.
 3 MR. SOULES: I understand that. Thank
 4 you, Mike.
 5 MR. WILLIAMS: Thank you.
 6 CHAIRMAN BABCOCK: Anybody else have
 7 anything on -- anything else on 735 or 736, the
 8 interlined version?
 9 Okay. Let's move on to the next item on
 10 our agenda, and thanks very much, Mike, for showing up
 11 and helping us with this.
 12 MR. BAGGETT: No problem.
 13 CHAIRMAN BABCOCK: And that is some
 14 amendments to the TRAP Rules, and Bill Dorsaneo and
 15 Judge Womack -- I was told by Professor Dorsaneo that
 16 "justice" was not the right term, should be Judge
 17 Womack, unless he was gooning me. Who wants to talk
 18 first?
 19 HONORABLE PAUL WOMACK: I guess I will
 20 since it's my fault.
 21 CHAIRMAN BABCOCK: Nice to have you
 22 here, Judge.
 23 HONORABLE PAUL WOMACK: Thank you.
 24 There are -- our reason for taking up your time is I
 25 wanted in case any other rule of appellate procedure

1 it was not enough for the attorney to ask, and maybe
 2 reflecting some difficulty in criminal cases that's
 3 not -- may not be there in civil cases.
 4 First of all, it's just physically
 5 difficult sometimes for attorneys and clients to be
 6 together and consult about these things, and I guess
 7 also there is a tendency on the part of criminal
 8 defendants maybe to turn on their attorneys that's not
 9 present in civil cases, but I'll bow to the civil
 10 practitioners who have superior knowledge of that.
 11 So the revised rule literally now says
 12 that the appellant and his or her attorney have to sign
 13 a written withdrawal, which literally would give the
 14 attorney veto power over dismissing an appeal even when
 15 the client wanted to dismiss it, and don't you know
 16 that we had an attorney come up and say we couldn't
 17 dismiss the case even though his client had personally
 18 asked for it because he, the attorney, wouldn't sign
 19 it, and we don't really think that's the purpose of the
 20 rule, and so that's why we're trying to eliminate that.
 21 MR. SOULES: So moved.
 22 CHAIRMAN BABCOCK: Second?
 23 HONORABLE SARAH DUNCAN: Hold on a
 24 second.
 25 CHAIRMAN BABCOCK: Justice Duncan.

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1 changes were being considered that we coordinate and
 2 not be issuing amendments of piecemeal. I know that
 3 the Supreme Court will be happy to make any changes we
 4 desire that affect any criminal cases just as we're
 5 happy to do the reverse.
 6 So there are a couple of these rules
 7 that I think really affect only criminal cases and
 8 really only affect our Court. The change in Rule 67
 9 is -- I think an inadvertent implication was made that
 10 the Court of Criminal Appeals could grant discretionary
 11 review of an appellate case only when a petition for
 12 discretionary review had not been filed.
 13 In fact, we sometimes like to grant
 14 discretionary review when a petition has been filed but
 15 it's a really rotten petition and we think there is a
 16 more interesting point in the case. So to remove that
 17 implication that filing a petition would limit our
 18 discretion in that regard, we just want to strike some
 19 language out of Rule 67, and this is a -- coming before
 20 you with these changes is a good opportunity for us to
 21 have your wisdom and thoughts on this.
 22 PROFESSOR DORSANEO: Do them one at a
 23 time.
 24 CHAIRMAN BABCOCK: Do them -- I think
 25 that's a good idea. Bill Dorsaneo just said that we

1 HONORABLE SARAH DUNCAN: By the same
 2 token, we have had cases where the client is
 3 incarcerated and thinks there's been an agreement of
 4 some sort reached, and he/she thinks, "Oh, I can
 5 dismiss my appeal now," and they will file something
 6 with our court saying, "Please dismiss my appeal. I've
 7 settled with the state," and then you talk to their
 8 attorney, and they are seriously misinformed, and my
 9 concern is if you don't require something from the
 10 attorney we might end up dismissing criminal
 11 defendants' appeals when they have asked for a
 12 dismissal because of misinformation and not because
 13 they would, if correctly informed, want their appeal
 14 dismissed, and I'm not sure how you do that. Obviously
 15 the attorney can't veto the client's informed decision.
 16 MR. YELENOSKY: Can you agree to stay
 17 it?
 18 HONORABLE SARAH DUNCAN: Not after
 19 plenary power is over.
 20 HONORABLE PAUL WOMACK: Well, I don't
 21 think this change to the rule would necessarily create
 22 this problem because it requires the signature,
 23 personal signature of the defendant, but it doesn't say
 24 that that's sufficient necessarily if the court has
 25 some trouble.

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1 HONORABLE SARAH DUNCAN: As long as you
 2 put that on the record I'm fine.
 3 HONORABLE PAUL WOMACK: Fine. Thanks
 4 for raising it.
 5 CHAIRMAN BABCOCK: Any other comments
 6 about this? Yeah, Bill.
 7 PROFESSOR DORSANEO: The only other
 8 thing I would point out is we do have a rule on
 9 signing, Rule 9.1, that deals with represented parties.
 10 I don't think that anyone could conclude that the
 11 provisions of that rule would supersede proposed
 12 42.2(a), but it might be worth some sort of a reference
 13 in the comment that, you know, 9.1(a), Appellate Rule
 14 9.1(a), does not apply or notwithstanding the
 15 provisions of appellate Rule 9.1(a), something like
 16 that. It's a small point, but normally our rule is
 17 represented parties -- in a represented party's case a
 18 document filed on that party's behalf must be signed by
 19 at least one of the party's attorneys.
 20 CHAIRMAN BABCOCK: All right. Any other
 21 comments? Okay. Let's vote on the rule first and then
 22 we'll take up Bill's comment about the comment, which I
 23 think is -- Judge, do you have a reaction to Bill
 24 Dorsaneo's point?
 25 HONORABLE PAUL WOMACK: No. That was

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1 the thought that I had when I was talking to Justice
 2 Duncan, and I agree with her entirely.
 3 CHAIRMAN BABCOCK: Okay. All in favor
 4 of amending Rule 42.2(a) as indicated raise their hand.
 5 All opposed? Another vote by
 6 acclamation.
 7 Now, about the comment. Bill, do you
 8 and Judge Womack want to get together on language?
 9 HONORABLE PAUL WOMACK: Yes.
 10 CHAIRMAN BABCOCK: Okay. And when you
 11 get some language if you want us to bless it, let us
 12 know.
 13 HONORABLE PAUL WOMACK: Okay.
 14 CHAIRMAN BABCOCK: All right. The next
 15 one, Judge?
 16 HONORABLE PAUL WOMACK: If I could draw
 17 your attention to the next page, Rule 73 would be a new
 18 rule, and the more important part of it might be the
 19 form that follows the rule. The Court of Criminal
 20 Appeals has the jurisdiction of habeas corpus after a
 21 final conviction in a felony case. The petitions for
 22 these habeas corpus writs are filed in the convicting
 23 courts, and after fact-finding procedures if necessary
 24 are completed in the convicting courts then everything
 25 is forwarded to the Court of Criminal Appeals.

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1 So now we have a lot more prison space
 2 and a lot more prisoners, and the number of these
 3 post-conviction petitions that we're getting now is
 4 running at the rate of 6 or 7,000 annually, maybe more.
 5 We have a staff of attorneys to process these as they
 6 come in from the district courts, and the great bulk of
 7 them are pro se petitions, and a lot of them are
 8 handwritten. I'm sure more than half of them are
 9 handwritten, and the biggest trouble with them is just
 10 trying to decipher what it is the contention is
 11 contained -- what contention is contained in the
 12 petition.
 13 The Federal courts by an appendix to
 14 Title 28 of the United States Code have promulgated a
 15 form that's required when someone petitions in Federal
 16 court, and it is our thought that if such a form or
 17 similar form were used in the state side that it would
 18 make the processing of these forms easier for everyone
 19 concerned, and, of course, protecting ourselves I guess
 20 is our primary concern, but it should be of help to the
 21 district courts and to the prosecutors as well.
 22 So we've tried to come up with a rule
 23 which requires the form and then the form itself.
 24 Professor Dorsaneo has kindly suggested some change,
 25 formal changes in the language of the rule and the

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1 numbering of the rule to make it more consonant with
 2 the language and rule numbering scheme that we have
 3 already, so I've taken that into account and will
 4 probably come back with some changes on that.
 5 I'm especially interested to have your
 6 reactions and advice, Bonnie, especially. We're going
 7 to kind of put the onus on the district clerks to
 8 not -- basically not accept these petitions if they're
 9 not on this form.
 10 MS. WOLBRUECK: I noticed that.
 11 HONORABLE PAUL WOMACK: And naturally we
 12 want to try to get the forms to the prison system so
 13 the state has petitions and should have them widely
 14 available for the prisoners to use, but surely there is
 15 going to be some lag time in getting use of these if we
 16 adopt this rule.
 17 CHAIRMAN BABCOCK: Yeah, Luke.
 18 MR. SOULES: If we do adopt it, I think
 19 the noncompliance first sentence should add the words
 20 "together with a copy of the form," so that if we're
 21 going to send a defective petition back, at least we
 22 know that the petitioner is going to have a copy of the
 23 form that would permit that petitioner to correct the
 24 defect unless there is some process in the prison
 25 system that these forms are going to be distributed,

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1 which we, of course, have no control over.
 2 So at least if we put that in there,
 3 there would be -- that could be a constitutional
 4 problem. You're sending it back because he doesn't
 5 have it on the right form, but if you send them the
 6 form when you send the thing back it probably erases
 7 that issue as well. That's my only observation.
 8 CHAIRMAN BABCOCK: Okay. Bonnie, did
 9 you have some comments?
 10 MS. WOLBRUECK: I was wondering, Judge
 11 Womack, if you say, "The clerk of the court may," is
 12 there -- I'm just wondering if the clerk's may not and
 13 choose not to do that and follow the rule if that's --
 14 HONORABLE PAUL WOMACK: Well, then they
 15 get caught by the next sentence which is --
 16 MS. WOLBRUECK: I noticed the next
 17 sentence.
 18 HONORABLE PAUL WOMACK: If you send it
 19 to us, we're going to send it back to you anyway. So
 20 you save yourself one set of postage.
 21 MS. WOLBRUECK: All right. So if we can
 22 send it, you'll send it back to us, and then we'll take
 23 care of it. Okay.
 24 CHAIRMAN BABCOCK: Judge, I had a
 25 question on the form, Items 10 and 11. You ask the

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1 prisoner whether they testified at the guilt or
 2 innocence phase and whether they testified at the
 3 sentencing phase. What is the purpose for that?
 4 HONORABLE PAUL WOMACK: I guess it's
 5 because it's helpful to know this in facing a claim
 6 that -- there are a lot of claims that attorneys kept
 7 their stories secret, that they had a story that they
 8 told the attorney, and the attorney did nothing to get
 9 that presented at the trial, and so that's I think the
 10 reason for that.
 11 CHAIRMAN BABCOCK: Luke.
 12 MR. SOULES: This is intended to be
 13 clerk friendly and not Court of Criminal Appeals
 14 unfriendly, hopefully. If we could also in the
 15 noncompliance or modify that so it would say, "The
 16 clerk of the convicting court will without filing an
 17 application that is not on this form" so that the clerk
 18 has clear direction. If it's not on this form it gets
 19 sent back with the form, and that's routine.
 20 MS. WOLBRUECK: I think that that's
 21 fine, and I can see that clerks have real difficulty in
 22 identifying these post-conviction writs anyway, and
 23 maybe this would give us an opportunity to mail it back
 24 and say, "If this is a post-conviction writ, it needs
 25 to be on this form."

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1 MR. SOULES: And "We're not filing it at
2 this time."
3 MS. WOLBRUCK: Yeah.
4 MR. YELENOSKY: Following up on that
5 point, the only defect we've talked about is it not
6 being on this form, but the rule reads that it could be
7 returned if it's not in compliance with this rule,
8 which I assume means it doesn't have everything under
9 (c) in the contents, and I'm wondering how strictly
10 construed that is. I mean, if one piece of information
11 is missing, do they have to have every court number,
12 et cetera?
13 MR. SOULES: That shouldn't be the
14 clerk's burden to figure that out.
15 MR. YELENOSKY: Well, is the Court of
16 Criminal Appeals going to send it back if every single
17 item is not filled in? It's just a question. Is that
18 the intent?
19 HONORABLE PAUL WOMACK: No, it's not,
20 and I think that's a good point, and probably the best
21 thing to do is change that noncompliance language so it
22 says "not on the form." Thanks for the suggestion.
23 CHAIRMAN BABCOCK: Any other comments
24 about this rule? Judge Rhea, nice to see you.
25 HONORABLE BILL RHEA: Sorry to be late.

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1 CHAIRMAN BABCOCK: Do I understand,
2 Bill, that you and Judge Womack are going to work on
3 the language and bring it back to us?
4 PROFESSOR DORSANEO: Yes. We have it
5 pretty substantially completed, and I think we could
6 provide it today.
7 CHAIRMAN BABCOCK: Today? Great.
8 PROFESSOR DORSANEO: Do you want us to
9 just give it to Mr. Pemberton?
10 CHAIRMAN BABCOCK: That would be great.
11 If we can circle back around to it today, that would be
12 great.
13 HONORABLE PAUL WOMACK: All right. Now,
14 the remaining proposed change that we have is in
15 Rule 38.6, time to file briefs. I want to say that the
16 Court of Criminal Appeals is not invested in this rule
17 change at all, but when the 1997 amendments were made
18 there was no provision made to extend the time for
19 filing any brief other than the appellant's brief, and
20 my understanding is that the various courts of appeals
21 have reacted in different ways when appellees or other
22 parties have requested an extension of time to file a
23 brief so that there is now a lack of uniformity and
24 maybe some confusion about whether there is even
25 authority to extend the time for filing an appellant's

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1 brief other than the brief. So because we have heard
2 so much about this I just wanted to kind of get it on
3 the table. It's really of no concern to us whether
4 this change be made or not.
5 PROFESSOR DORSANEO: A related question
6 would be, you know, what briefs are we talking about?
7 You could restrict the -- assuming that it would be
8 changed to cover briefs filed by appellants and by
9 appellees, could restrict the language of the sentence
10 to initial briefs, and that would require a little bit
11 of tinkering with the other language in 38.6, which is
12 "time to file briefs."
13 The Court in its subparagraph to reply
14 briefs indicate that they must be filed within 20 days
15 after the date the appellee's brief was filed. It
16 would be my view that briefs, regardless of whether
17 they're initial briefs or reply briefs, are helpful to
18 the courts, and they ought to be required to at least,
19 you know, take them, and maybe then they'll look at
20 them. So I would say all briefs, not just initial
21 briefs, et cetera. I think most of the appellate
22 judges think that way, too, but apparently not all.
23 CHAIRMAN BABCOCK: Justice Hecht.
24 JUSTICE HECHT: The reason this was
25 written this way, as I recall it, was that the practice

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1 in our court is to require a motion on the petitioner,
2 on the petitioner's brief, but when the respondents ask
3 for more time we usually just say, "Well, if you" -- we
4 send them a letter that says, "If you get your brief in
5 before the Court looks at the petition, fine; and if
6 you don't, you don't."
7 So we don't keep the respondent from
8 filing a late brief. We just don't have any provision
9 for doing it, and I think there was some assumption
10 along the line that that's the way the court of appeals
11 would do it, too, but they have not -- Paul is right.
12 They have not uniformly construed the rule, and I can't
13 imagine that any appellate court wouldn't want to have
14 the power to extend the time for any brief of an amicus
15 or a third party or reply brief or any kind of brief.
16 We need all the help we can get usually.
17 MR. SOULES: I move the rule be changed
18 according to the text there at 38.6 on page 240.
19 CHAIRMAN BABCOCK: Anybody second that?
20 PROFESSOR DORSANEO: I'd just add the
21 letter "s" to the word "brief."
22 MR. SOULES: With that change.
23 CHAIRMAN BABCOCK: Second?
24 MR. HAMILTON: You better take out "a."
25 MR. EDWARDS: You better take out "a"

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1 then.
2 PROFESSOR DORSANEO: Say not "a briefs"
3 but "briefs." That's my idea.
4 CHAIRMAN BABCOCK: "Briefs." Yeah. Any
5 discussion? All in favor of changing Rule 38.6(d)
6 raise their hand.
7 All opposed? Another vote by
8 acclamation.
9 Judge Womack, you're on a roll here.
10 HONORABLE PAUL WOMACK: On the subject
11 of appellate judges' salaries now...
12 MR. SOULES: So moved. Trial judges,
13 too, by the way.
14 HONORABLE PAUL WOMACK: Thank you for
15 your time.
16 CHAIRMAN BABCOCK: Thank you, Judge, and
17 you and Bill will double back with us about the
18 language on Rule 73?
19 HONORABLE PAUL WOMACK: Yes.
20 CHAIRMAN BABCOCK: Justice Hecht.
21 JUSTICE HECHT: Could I ask the
22 committee's idea about timing? We don't want to hold
23 up the Court of Criminal Appeals' changes because I
24 think particularly the one, Rule 73, will make a
25 difference in their -- in the way they're conducting

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1 their business. There are, I think, two other changes
2 or two or three other changes in the TRAP Rules that
3 I'm aware of, or that have been raised that I'm aware
4 of. I don't know if the committee wants to hold these
5 up for those because they probably can't be done until
6 the next meeting or if we should go ahead with these
7 changes.
8 PROFESSOR DORSANEO: Justice Hecht, I'm
9 really only aware of one. Is it the one -- if you
10 would refresh our recollection, the one about the court
11 reporter?
12 JUSTICE HECHT: There's that one that
13 Judge McCown has proposed, wants to revisit Rule 13.1
14 about whether the presumption is the court reporter
15 should be in the room or not be in the room, who has to
16 ask or not ask. Then there's one, TRAP 43, whether we
17 should specify that a court of appeals can remand a
18 case for entry of judgment pursuant to settlement.
19 That's just not listed in the rule, and Brian Garner
20 has asked whether the briefing rules should describe
21 the kinds of issues -- the way the issues should be
22 stated. So those are --
23 PROFESSOR DORSANEO: Those haven't been
24 presented to the subcommittee. If any of them require,
25 you know, immediate action, I think we could probably

<p style="text-align: right;">Page 540</p> <p>1 do it pretty quickly, particularly the one involving 2 the record. What's your pleasure? 3 JUSTICE HECHT: Well, I'm easy. You 4 know, I just think it of some urgency that we go ahead 5 with Rule 73, but I don't see how we can discuss these 6 other things at this meeting, so maybe we should go 7 ahead with these changes. 8 MR. SOULES: I think so. I mean, these 9 are -- except for the last one we voted on, these are 10 Court of Criminal Appeals oriented -- 11 JUSTICE HECHT: Right. 12 MR. SOULES: -- and I think that we 13 should be as accommodating as possible in that regard, 14 and one that affects all cases and is totally 15 uncontroversial. 16 JUSTICE HECHT: Okay. 17 PROFESSOR DORSANEO: And those three 18 that you mentioned that would be on the agenda are 19 worth considering, but none of them really make any 20 particular difference from my standpoint to be done 21 today. 22 JUSTICE HECHT: Right. Right. Okay. 23 CHAIRMAN BABCOCK: Okay. We'll take a 24 10 or 15 minute recess. 25 (Recess taken.)</p>	<p style="text-align: right;">Page 543</p> <p>1 CHAIRMAN BABCOCK: The comment to Rule 2 735. 3 MR. BAGGETT: Right. 4 CHAIRMAN BABCOCK: Okay. 5 MR. BAGGETT: Okay. "Rules 735 and 736 6 do not address nor purport to change duties of a lender 7 seeking foreclosure," period. "Nor do these rules 8 preclude a respondent from timely proceeding in 9 district court to contest the right to foreclose under 10 Rule 736" in parentheses (10), "and abate a Rule 736 11 proceeding," period. Yes? 12 HONORABLE SARAH DUNCAN: I would only 13 suggest that you not be so restrictive as to say 14 "respondent" because there may be other people 15 interested who have a right standing to file a 16 stand-alone lawsuit who have not been named as a 17 respondent in the 735 and 736 proceeding. 18 MR. BAGGETT: That is the one thing we 19 changed because we didn't know how to describe that 20 person or entity or whatever it is that we did, and we 21 just made it consistent, we tried to make it, with how 22 we referred to them in the rule otherwise. 23 CHAIRMAN BABCOCK: Any other comments 24 about the comment? 25 MR. SOULES: Just the words "under 736"</p>
<p style="text-align: right;">Page 541</p> <p>1 CHAIRMAN BABCOCK: All right, Baggett, 2 have you and Elaine got a comment? 3 MR. BAGGETT: We have. 4 CHAIRMAN BABCOCK: Okay. 5 MR. BAGGETT: I think they're good. I 6 have no problems. 7 CHAIRMAN BABCOCK: All right. The 8 follow-up from this morning is that Elaine Carlson and 9 Mike Baggett have a comment, and Mike Baggett is going 10 to read the comment to us. 11 MS. McNAMARA: You need a gavel, Chip. 12 CHAIRMAN BABCOCK: And you won't be able 13 to hear it if you don't quit talking. 14 MR. BAGGETT: And Judge Baker has gone 15 over it, too. 16 CHAIRMAN BABCOCK: All right. Tommy, 17 Bobby, let's go. 18 Mike, do you want to tell us the comment 19 that you and Elaine have got to Rule 736? 20 MR. BAGGETT: I will tell you I think we 21 think this is a positive improvement, so I want you to 22 know I take positive improvement as a positive, not a 23 negative. So in any event, if you've got it in front 24 of you, 735, and the concept is, is to let them know 25 when they read Rule 735 that they need to read on at</p>	<p style="text-align: right;">Page 544</p> <p>1 is that necessary after the word "foreclosure"? 2 MR. BAGGETT: That's what that 3 specifically does, is -- 4 MR. SOULES: But it doesn't limit their 5 right to contest foreclosure under anything? 6 MR. BAGGETT: No. 7 MR. SOULES: So why do we say "under 8 736"? 9 PROFESSOR CARLSON: Well, Luke, you're 10 right, and we could not refer to 9, which is going to 11 become 10. It was just sort of a road map that if you 12 don't want to go the T.R.O. route you can go to the 13 expedited abate under section 9, soon to be 10. 14 MR. SOULES: I'm between abate and 15 foreclosure there under 736. To contest foreclosure 16 and then skip over the words "under 736," take those 17 out, and then say "or abate" and leave the rest of it. 18 MR. BAGGETT: That's fine with me. 19 CHAIRMAN BABCOCK: Is that okay, Elaine? 20 PROFESSOR CARLSON: Yeah. That's fine. 21 MR. BAGGETT: That's fine. 22 CHAIRMAN BABCOCK: Okay. Any other 23 comments about the comment to 735? 24 PROFESSOR DORSANEO: I didn't draft the 25 complete comment down. I don't know if it's that</p>
<p style="text-align: right;">Page 542</p> <p>1 the end of 736 to discover golden nuggets in there if 2 they need them, which I understand, and the committee 3 doesn't have any problem with this, and Judge Baker 4 participated in this, so I think we're okay. 5 Here's what we propose to add as another 6 sentence, two sentences, at the end of 735, and it is 7 as follows. Now, this is your handwriting, so if I 8 goof it up, you be sure and give it back. 9 PROFESSOR CARLSON: And it's a comment. 10 MR. BAGGETT: Okay. "Rules 735 and 736 11 do not address," comma, "nor purport to change," comma, 12 "duties of a lender seeking foreclosure," period. "Nor 13 do these rules preclude a respondent from timely 14 proceeding in district court to contest the right to 15 foreclose under Rule 736," and it's going to be 10 when 16 we make the other change that Professor Dorsaneo wants, 17 "and abate a Rule 736 proceeding." Do you want me to 18 do that again? 19 CHAIRMAN BABCOCK: Yeah. 20 MR. BAGGETT: Okay. 21 CHAIRMAN BABCOCK: Carrie, get this 22 down. 23 MR. BAGGETT: And she's got it in the 24 form of a comment, and to the extent that that's the 25 mechanical way to do it, that's fine.</p>	<p style="text-align: right;">Page 545</p> <p>1 important, you know, but I don't know why it needs to 2 say "or purports to change." Why not say, "Rule 735 3 and 736 do not change," rather than all these extra 4 words, "address or purport to change." I would have 5 similar comments if I had it all written down about the 6 rest of it, I'm sure. 7 MR. YELENOSKY: We're sure. 8 PROFESSOR DORSANEO: So in substance 9 that makes good sense. I would prefer if somebody 10 would type it up. 11 MR. BAGGETT: I don't mind making it 12 more straightforward and leaving out the part -- if 13 it's all right with you, Elaine, just to leave it 14 "Rule 735 and 736 do not change duties of a lender 15 seeking foreclosure." 16 PROFESSOR CARLSON: That's fine. 17 CHAIRMAN BABCOCK: Okay. You got that, 18 Carrie? 19 Okay. Any other comments to the 20 comment? Okay. Do I hear a motion to approve the 21 comment? 22 MR. HALL: So moved. 23 CHAIRMAN BABCOCK: Okay. Second? 24 MR. YELENOSKY: Second. 25 CHAIRMAN BABCOCK: All in favor of the</p>

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1 comment as changed and amended, raise your hand.
 2 All opposed? Again, by acclamation.
 3 Carrie will you be sure and type that up and make sure
 4 Mike and Elaine see it and then get it to Bob
 5 Pemberton?
 6 MR. BAGGETT: There is one other change
 7 that's the movement, and let me address that.
 8 CHAIRMAN BABCOCK: Yeah.
 9 MR. BAGGETT: Okay. Bill Dorsaneo's
 10 recommendation, and we accept this, is the former
 11 provision under 7 says "only issue." That will remain
 12 as it is with the first sentence as it is. The second
 13 sentence of the first paragraph as well as the second
 14 paragraph will then be moved to a new section 9, which
 15 will be labeled "nonpreclusive effect of order."
 16 Let me do that one again while you-all
 17 are all looking at it. What was formerly 7(a) will no
 18 longer be an (a) because there will just be a sentence
 19 under it. The first sentence will be under there. The
 20 second sentence of that first paragraph will now be the
 21 first sentence of 9 along with the second full
 22 paragraph, and the heading of section 9 will be
 23 "nonpreclusive effect of order." Bill, that's what we
 24 talked about? Okay. And Judge Baker?
 25 Okay. Now, the additional change that's

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1 required is the old paragraph 9, which is "abatement
 2 and dismissal" will now be renumbered 10. So it's the
 3 last thing and then 9 obviously.
 4 CHAIRMAN BABCOCK: All right. Any
 5 comments on that? Yeah, Bill.
 6 PROFESSOR DORSANEO: One last question,
 7 Mike.
 8 MR. BAGGETT: All right.
 9 PROFESSOR DORSANEO: When you read those
 10 two together -- and this is really a question about
 11 substance -- we're not trying to say that 9 is subject
 12 to 10, right? It's not necessary to take action before
 13 the signing of the order in order to avoid the
 14 preclusive effect, right?
 15 MR. BAGGETT: No, I don't think that is
 16 right. If you have an order that's been signed, the
 17 requirement to get an order is completed, and you do
 18 have to file a new lawsuit before the order is signed
 19 and give notice of that lawsuit in the application
 20 process.
 21 PROFESSOR DORSANEO: Hmmm.
 22 CHAIRMAN BABCOCK: Is that okay, Bill?
 23 MR. BAGGETT: Now, don't forget what the
 24 order is. All it is is a step in the process to
 25 proceed with foreclosure, period. Nothing else.

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1 CHAIRMAN BABCOCK: Any other comments
 2 about this change?
 3 MR. BAGGETT: Bill, for your -- if they
 4 got the order and they were -- they can still get a
 5 T.R.O., they can still do whatever they want to because
 6 you've still got to go forward with the 21 days notice
 7 and all the stuff you had to do already.
 8 CHAIRMAN BABCOCK: Are we okay?
 9 MR. BAGGETT: Yes.
 10 CHAIRMAN BABCOCK: Anybody move the
 11 adoption of this?
 12 HONORABLE MICHAEL SCHNEIDER: So moved.
 13 MR. JACKS: Second.
 14 CHAIRMAN BABCOCK: All in favor of
 15 moving the language from paragraph 7 to paragraph 9,
 16 "nonpreclusive effect of order" and renumbering
 17 "abatement and dismissal" to No. 10, raise your hand.
 18 All opposed? Again, by acclamation, so
 19 that will be done.
 20 MR. BAGGETT: Thank you.
 21 CHAIRMAN BABCOCK: Thank you.
 22 MR. BAGGETT: Easy committee. I'm being
 23 facetious. For those of you who thought I was serious,
 24 I'm not.
 25 CHAIRMAN BABCOCK: Okay. The other

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1 matter left over from this morning was, Bill, have you
 2 had a chance to draft a comment on Rule 42.2?
 3 PROFESSOR DORSANEO: We did drafting on
 4 all of those matters, and Judge Womack was going to go
 5 word process them right now.
 6 CHAIRMAN BABCOCK: We'll take that up
 7 after lunch, and that would be with respect to 42.2 and
 8 Rule 73, correct?
 9 PROFESSOR DORSANEO: (Nods head.)
 10 CHAIRMAN BABCOCK: Okay. I don't see
 11 Paula Sweeney, who is next on the agenda regarding voir
 12 dire. Anybody here been appointed to step into her
 13 shoes today?
 14 HONORABLE DAVID PEEPLES: I am the
 15 subchairman on that. I didn't realize she was not
 16 going to be here, Chip. We had a conference call.
 17 Most of the subcommittee was present. Nothing
 18 definitive was decided, and it is my opinion that we
 19 need to have a good discussion in this group about what
 20 to do in the area of voir dire. It's hard to draft
 21 something if you don't know what the committee wants,
 22 and there is some major things that need to be
 23 discussed about voir dire in the opinion of some of us.
 24 CHAIRMAN BABCOCK: Okay. Why don't --
 25 HONORABLE DAVID PEEPLES: Other people

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1 might want to remember it differently, but I don't
 2 think we decided anything that got us very far down the
 3 road.
 4 CHAIRMAN BABCOCK: This was brought to
 5 the Court's attention by Joe Jamail from Houston, who
 6 wanted us to review some suggestions regarding voir
 7 dire. Justice Hecht, did you have any information
 8 about the thinking on that?
 9 JUSTICE HECHT: Yes. Just a word of
 10 background, also attached to the agenda that you got, I
 11 think everybody got earlier, it's Item 4, I think, and
 12 it's Bates stamped 195 is a letter from Joe Jamail of
 13 Houston to Chief Justice Phillips and myself proposing
 14 the adoption of new Rule 226b, which is attached which
 15 would govern the conduct of voir dire; and then behind
 16 that in your materials is Senate Bill 1863, introduced
 17 in the last session by Senator Cain of Dallas, that
 18 would provide that in level one discovery cases you get
 19 at least one hour of voir dire, in level two at least
 20 two hours, and level three, at least three hours; and I
 21 don't recall whether this passed the Senate or not. I
 22 don't think it -- I'm not even sure it got to the
 23 House.
 24 But consonant with our intent on taking
 25 up Bill's ideas that were introduced in the Legislature

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1 the last session that pertain to procedure, we put this
 2 on the committee's agenda to talk about both the bill,
 3 Joe Jamail's letter. Judge Brister has written on this
 4 subject and has had proposals in the past, and he has
 5 some materials in my pile here today. I guess you-all
 6 have them, too, and so that's how it got here.
 7 CHAIRMAN BABCOCK: Okay. There was a
 8 letter from Judge Johnson who is in McLennan County,
 9 who wrote Bob Pemberton a few days ago, last week
 10 actually, and he was very opposed to Senator Cain's
 11 bill, saying that the trial courts ought to have
 12 discretion in that matter.
 13 Judge Peeples, do you want to outline as
 14 best you understand it what the various issues are that
 15 you think -- Judge Brister.
 16 HONORABLE SCOTT BRISTER: Did you give
 17 everybody copies of my letter and attachment from the
 18 Jury Task Force proposals?
 19 MR. PEMBERTON: I think both the Johnson
 20 letter and Judge Brister's materials were in the stack
 21 that everybody got today.
 22 HONORABLE SCOTT BRISTER: Most people
 23 I've talked to have not got it.
 24 CHAIRMAN BABCOCK: Carrie, where is that
 25 stack?

1 MS. GAGNON: Joe Johnson's letter is in
2 everybody's folder that you picked up with your
3 nametag. Judge Brister's letter and attachment is only
4 in the subcommittee dealing with that.
5 HONORABLE SCOTT BRISTER: Censorship,
6 huh?
7 CHAIRMAN BABCOCK: Not intended.
8 Okay. She's making copies, Judge.
9 HONORABLE SCOTT BRISTER: To make it
10 clear, this is just the Jury Task Force materials,
11 which a lot of time and effort went into, and it seems
12 to me if we're going to talk about voir dire, that's
13 what a large part of the Jury Task Force was about. We
14 ought to look at those proposals.
15 CHAIRMAN BABCOCK: Let's see what the
16 issues are first.
17 HONORABLE DAVID PEEPLES: Joe Jamail's
18 letter had as an attachment this proposed rule on voir
19 dire which would basically require a reasonable amount
20 of time for voir dire to state what you expect to prove
21 and relief sought. It's hard to be opposed to
22 reasonable amounts of time and so forth. I don't think
23 anybody is. I can't speak for our subcommittee, Chip,
24 because we just all talked and didn't reach consensus
25 on anything important.

1 Some of us expressed the concern that if
2 you're going to make there be a certain amount of time
3 or a lot of time then we need to start talking about
4 what lawyers are going to do with that time. It's my
5 view just based upon what I've seen and heard from
6 many, many sources that in a lot of courts judges allow
7 lawyers to make detailed fact statements, for example,
8 which causes jurors to start deciding the case, and
9 they get disqualified and challenged for cause.
10 There is the issue of commitments, what
11 can you get a commitment to do. Follow the law, well,
12 that's fine, but to go beyond that that becomes
13 problematical. Leading questions, should they be
14 permitted. When can you rehabilitate and when can you
15 not rehabilitate a juror or can a juror be
16 rehabilitated.
17 These are, in my opinion, important
18 questions that happen all the time, and I think we
19 would be doing a service to the legal system if we
20 discussed these issues and tried to come up with some
21 kinds of guidelines and principles. They may have to
22 be general, I don't know, but I think there is a lot of
23 variety all across the state and probably within
24 different counties in different courts about what --
25 how voir dire is conducted, and maybe that's good, but

1 I think there is a lot more at stake in the voir dire
2 process than just who wins a lawsuit.
3 It's my view that if in the voir dire
4 process you lose a representative jury, a jury
5 that's no -- if what ends up is no longer
6 representative of the community then the results can
7 cause lack of faith in the system, and that's what I
8 think is at stake.
9 CHAIRMAN BABCOCK: Do we have a problem
10 in this state in that regard? Are we losing
11 representative juries?
12 HONORABLE DAVID PEEPLES: I think in
13 some courts you do, just what I hear about.
14 CHAIRMAN BABCOCK: Okay. Bill.
15 PROFESSOR DORSANEO: In our current rule
16 book there really isn't any coverage of the subject of
17 voir dire examination. Rule 230 says you can't ask
18 certain questions. The sentence that follows the first
19 part of the admonitory instructions that follow
20 Rule 226 simply says the attorney shall now proceed or
21 may now proceed with their examination, but as far as
22 the rule book is concerned, there is not really very
23 much information about voir dire at all, and probably
24 that's because it wasn't necessary in the before time,
25 but that's not now.

1 Professor Albright maybe could refresh
2 my recollection if she remembers whether we did very
3 much about this in the recodification draft. I don't
4 know that we did. We added Batson/Edmunson kinds of
5 things, but I don't think we went into this at all,
6 and I think it would be appropriate for a subcommittee
7 to examine at least, you know, the important issue
8 about who conducts voir dire examination, which isn't
9 even -- you know, isn't even talked about in our rules
10 and the kinds of other things that Judge Peebles
11 mentioned.
12 CHAIRMAN BABCOCK: Yeah. Steve.
13 MR. SUSMAN: And that's one area of the
14 rules -- of trial practice that seems to be working
15 just fine. Why do we want to mess with it? I mean,
16 why do you want to have rules where it seems to be
17 working great? I mean, one lawyer wants more time, one
18 lawyer wants less time, but I don't see any cry --
19 certainly there is no need to put a rule in there
20 simply because there is not a rule.
21 PROFESSOR DORSANEO: Well, what if the
22 judge says, "You're not going to conduct voir dire
23 examination. I'm going to do it."
24 MR. SUSMAN: I've never had a state
25 court judge tell me -- are there any judges -- are

1 there any horror stories? Is that going on?
2 What is? I've never heard of a state
3 court judge saying that.
4 CHAIRMAN BABCOCK: Judge Brister.
5 HONORABLE SCOTT BRISTER: I agree with
6 Mr. Jamail that we need a rule. Without question -- I
7 went around, as some of you know, I'm a big largely
8 anti-voir dire proponent, written a good deal on it,
9 gave speeches to the judicial conferences last year
10 around Texas. For example, I asked at every judicial
11 conference, "Does anybody allow the question, 'Well,
12 the other side has told you what they're going to
13 prove. We've told you what we're going to prove. If
14 you had to vote right now how many of you would vote
15 for my opponent?'" And there are judges in Texas who
16 do allow that right now.
17 Now, one can make the argument, we could
18 save a lot of time by doing that, just whoever gets the
19 most on their side on the jury wins. But there are --
20 there is no part of trial practice that varies more
21 across the state than voir dire. The proof of that is,
22 as I've quoted in several of my articles, every
23 authority, every lawyer, plaintiff's attorney, defense
24 attorney, John O'Quinn, Jim Sales, says the most
25 important part of the trial is jury selection.

1 I think, No. 1, that ought to give us
2 pause if that's more important than the evidence and
3 the facts and the witnesses, but I think what they may
4 be saying is, is that that is the most variable, that's
5 the most that's up in the air, that's open to doing
6 whatever you can talk the judge into doing, and if
7 that's so, the -- I've got in my article the
8 statistics, 6 percent of the people to whom we send
9 juror summons in Harris County actually make it on the
10 jury.
11 Now, this goes to the foundation of why
12 we have a jury. I'm a big proponent of juries. I
13 think juries do a lot of things to protect liberty in
14 this country, but No. 1, the main reason for it is
15 because they represent the community. I know more
16 about car wrecks, know about what juries do in car
17 wreck cases than anybody on the jury, but I'm not
18 representative of the community.
19 The problem is when you get 6 percent of
20 the community, which is the leftovers after we've
21 hashed through them, you do get skewed verdicts because
22 it is not representative anymore. Any statistician
23 will tell you a 6 percent nonrandomly selected sample,
24 which as we all know tends to be the people who have no
25 opinions on anything because that's the people who can

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1 make it through voir dire, then we do -- you get the
2 risk, same as you would with a six person jury that's a
3 smaller sample of the community, it's more skewed
4 results.

5 More importantly, in Harris County I
6 really sense a revolt. I think the best way -- if you
7 were against juries, the best way you could get rid of
8 juries in civil cases if you were so inclined would be
9 pass something like this bill requiring three hours of
10 it because there would be such an outrage among the
11 public. I mean, we had the bill that did pass saying
12 that you can't serve on juries more than -- you know,
13 if you've served you don't have to serve again 'til --
14 the average citizen may be a little upset about
15 McDonald's coffee cup or somebody getting off on a
16 capital case, but the main impact of what we do on
17 their lives is when they come down as jurors, and the
18 main concern is they don't like the time it takes.

19 The more and more time it takes, the
20 more and more intrusive questions we ask, the longer
21 the questionnaires, the more we're going to get a
22 reaction from them, and so I think it would be good to
23 have a rule. I obviously disagree on the details of
24 that rule. I think the Jury Task Force proposes a more
25 balanced rule, but the idea -- does anybody doubt that

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1 if we asked the public in an opinion poll, "How many of
2 you think we need -- lawyers need more rights to ask
3 you more questions to get you on a jury" or "How many
4 of you think judges should curtail that," does anybody
5 doubt how that vote is going to come out?

6 Now, the difficulty thing, of course, of
7 this committee is we're all lawyers, and so we all want
8 more, but I'm concerned that proposals that make it
9 more and longer are going to not end in a repeal of the
10 7th Amendment, but as we've seen from worker's comp
11 cases, you don't have to repeal the 7th Amendment for
12 jury trials to all go away. There are things that can
13 be done, and jury trials will disappear. We don't have
14 any interesting cases anymore. They are now all in
15 arbitration, and I don't want to see that happen with
16 no fault and personal injury and everything else we do.
17 It's going to disappear if we aren't responsive to what
18 I think most people are feeling.

19 CHAIRMAN BABCOCK: John had his hand up
20 first, if you still want to talk.

21 MR. MARTIN: The lack of uniformity is
22 what bothers me a lot. I had a judge last year in a
23 case that involved multiple parties not allow any of
24 the lawyers to conduct individual voir dire after the
25 general voir dire was completed. Well, maybe that's a

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1 decent rule. The only problem is nobody knew that's
2 what was going to happen when we questioned the jurors
3 individually, and the judge conducted it all himself,
4 and I just think there need to be some hard and fast
5 rules about some basic things like that so that we know
6 what the rules are, because I'm seeing more and more
7 disparity even within my own county, Dallas County, as
8 to how they're treating things like that.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: But I think if you start
11 writing the rules stating what questions you can ask,
12 there is no way. You can't do that. You have to leave
13 that up to the judge to be fair, and if you start
14 saying that lawyers have three hours in certain kind of
15 cases, they're going to take three hours.

16 HONORABLE MICHAEL SCHNEIDER: Yep.

17 MR. LOW: I think Steve is right. Right
18 now the judges are treating it the way they think it
19 should be treated, and I can say this, if we deal and
20 strike out the right of lawyers to -- and curtail too
21 much their right to conduct voir dire, we're going to
22 see the Legislature pass something, and you will see
23 it. So we have to be very, very careful what we do
24 here because that's a reality, and the Legislature is
25 not afraid of this committee or Court, and they will do

1 their own.

2 So right now there is something. There
3 is pretty case -- pretty clear law about when a juror
4 is disqualified. The judge has discretion under the
5 law to excuse the juror. Now, I don't know where this
6 6 percent came from because I bet you a lot of those
7 people just didn't get on the jury are way down below.
8 I mean, were they stricken?

9 But if you have both sides with opposite
10 views and they get their strikes, I don't see how you
11 argue that you have a representative of the community
12 unless you started out not having it on that panel
13 because you draw panels and don't draw the whole thing.
14 So I think we have to be very careful to start drawing
15 a rule that tells you what you can ask, what you can't
16 ask. Now, it may be if you leave it up to the judge at
17 his discretion -- and I don't disagree there should be
18 something if some judges aren't allowing you questions,
19 there should be maybe some general rule, but I'd keep
20 it as general as I could.

21 CHAIRMAN BABCOCK: Carl had his hand up
22 first, then Steve. Carl.

23 MR. CHAPMAN: I'm on that subcommittee,
24 and I agree with Judge Peoples that we didn't reach
25 consensus about a lot of things, but I am of the

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1 opinion that we reached consensus that Joe Jamail's
2 proposal, to the extent that it refers to a reasonable
3 time to examine the jury panel, is where we ought to
4 be.

5 There certainly are the issues of
6 commitment. There certainly are the issues of how
7 detailed a statement of facts ought to be made, but I
8 am of the opinion that the trial court ought to make
9 the decision based on the complicated or noncomplicated
10 nature of the case, based on the number of parties
11 whose views have to be presented, and based on the
12 kinds of responses that counsel received from the panel
13 as to how detailed the questions ought to be.

14 Voir dire, as I have conducted it, is a
15 living kind of thing. My voir dire's go from issue to
16 issue based on the kinds of responses I get from the
17 jury. Now, I think that the courts have said since
18 1919 that commitment -- committing the jury is not
19 something that we ought to be doing in Texas, but
20 hypothetical questions and hypothetical questions set
21 on the nature of the facts that counsel knows his case
22 or her case is going to be tried upon have never been
23 precluded, but rather, the question is whether or not
24 counsel can ask that question in such a way to elicit
25 the response that we're all interested in, and that is

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1 whether the jury panel members can be fair and
2 impartial, whether they will follow the law, and
3 whether they will limit their decisions based on the
4 facts that are admitted before the jury by the judge.

5 Now, beyond saying those things I don't
6 think we ought to make much comment, but I do think
7 that those things ought to be clear, because we have
8 judges -- I've had judges -- who have said in what I
9 thought were relatively complicated cases that each
10 side has ten minutes to voir dire the jury. Well, I
11 can hardly introduce my client in ten minutes and talk
12 about whether or not they have ever been represented by
13 my firm or any member of my firm, and so I just think
14 that the critical issue is that we need a rule that
15 imposes the requirement of reasonable time, and a judge
16 can make a determination about what reasonable time is.
17 We don't need to define that, and we need a rule that
18 says that reasonable inquiry can be made, but there
19 should not be an attempt to commit the jury panel
20 before the evidence is heard, and beyond that I think
21 we should say little, but I think a rule is necessary.

22 CHAIRMAN BABCOCK: Steve Susman.

23 MR. SUSMAN: He said basically what -- I
24 don't have anything to add.

25 CHAIRMAN BABCOCK: Judge Hardberger.

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1 HONORABLE PHIL HARDBERGER: I think
2 what's before us right now, at least on the two pieces
3 of paper we have in this room, is whether we should
4 have time limits on voir dire. I think to put time
5 limits on voir dire would be a great mistake because it
6 ignores the complexities of the case, which are going
7 to change quite dramatically.

8 Secondly, it takes away from the
9 discretion of the trial judge, and while it is true
10 that trial judges do vary in how they view voir dire
11 and there is possible for abuses to be on both ends of
12 that, one allowing too much voir dire, too many
13 questions, another one not allowing enough, you still
14 have to favor what the trial judge -- he's there.
15 She's there. That's a decision best made, I think, by
16 the trial judge, not by putting arbitrary limits which
17 totally ignore the practicalities of the exigent
18 situation. It favors order over justice, and I don't
19 think we ever ought to do that.

20 CHAIRMAN BABCOCK: I personally think we
21 ought to have a rule to standardize the pronunciation
22 of voir dire, and beyond that -- Judge Hardberger what
23 about Judge Brister's point that we ought to by rule
24 expand and talk about things other than just the time
25 limits, that the rule ought to cover other issues?

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1 HONORABLE PHIL HARDBERGER: Well, I
2 think, you know, there's nothing wrong with an
3 intelligent body of people looking at any problems, and
4 I guess Judge Peeples also hit upon some kind of hot
5 spots in voir dire. I'm not adverse to some sort of
6 further study on that. I do think we have to be
7 careful when we start making hard rules on a fluid
8 situation. That doesn't mean that no rules could ever
9 be made, but I think they should be looked at very
10 carefully, and we should move very slowly because you
11 wind up with a rule that really doesn't reflect our
12 present situation.

13 CHAIRMAN BABCOCK: Somebody back --

14 HONORABLE JIM DUNNAM: No disrespect to
15 the committee, but the idea of this committee looking
16 at what can be asked in more detail than we already
17 have case law gives me chills. I think that we have
18 maybe one problem in voir dire, and that is some judges
19 are being unreasonable in time limits. I think we can
20 solve that by the simple proposal of Mr. Jamail.

21 We have court of appeals that have
22 written on what you can say in voir dire. We have got
23 a lot of case law about what's proper questioning and
24 what's not proper questioning. If we go beyond what
25 the case law says is permitted then the case can be

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1 reversed. If we have problems with a few judges that
2 are being unreasonable on time then Mr. Jamail's
3 proposal would allow court of appeals to reverse a case
4 if they decide it was unreasonable. But in my
5 community this is simply not a problem, and if I go
6 home and tell the lawyers in McLennan County that we
7 are fixing to study or the Supreme Court -- I don't get
8 a vote here. I'm ex officio or something, but this
9 committee is going to study --

10 CHAIRMAN BABCOCK: Oh, everybody gets a
11 vote. Yeah, you get a vote.

12 REPRESENTATIVE DUNNAM: And I don't want
13 to vote either. I don't want to vote. That way I
14 can't be blamed. I think that really gives me chills.
15 I think that what will end up happening is it's going
16 to dummy down the practice of law. Lawyers, I mean,
17 lawyers know what the rules are. We have got a hundred
18 years of case law on what you can say or should not say
19 in voir dire. I trust my judges who are good judges,
20 and we have got good courts of appeals that if my
21 judges go beyond the scope and let me say something
22 that I shouldn't say, they can reverse the case.
23 That's the way our system works, and going into some
24 kind of rule that you can say this and you can't say
25 that, here is a comment that's two pages long about

1 what's -- examples of what's appropriate and not, I
2 think that is not the way to go.

3 CHAIRMAN BABCOCK: Do you agree,
4 Representative Dunnam, that the Legislature is going to
5 do something if the Court doesn't?

6 REPRESENTATIVE DUNNAM: I think, and I
7 speak based on capitol rumor, but I think that the bill
8 was filed because there was some judge that gave a
9 lawyer five minutes to do voir dire, and so David
10 Cain -- and I'm just saying based on rumor. I don't
11 know that. So David Cain said, "We got to do
12 something. We're going to file a bill and give you a
13 minimum time."

14 I don't think that's necessary. I think
15 if we say like Mr. Jamail said, "a reasonable time,"
16 and then let's let the court of appeals determine in a
17 case by case nature, and let's develop some case law
18 about what a reasonable time is. I think that was a
19 reaction to an isolated case, and the biggest complaint
20 that I get from lawyers in my county and surrounding
21 counties about what the Legislature does and also what
22 this committee does is it passes statewide rules in
23 response to very limited, isolated problems. The
24 biggest complaints on the discovery rules are that we
25 have some lawyers who are clearly abusing the discovery

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1 practice. In depositions, for example, clearly abusing
2 it. We have no problem in McLennan County, but because
3 some lawyer in Houston has a jerk in depositions --

4 MR. YELENOSKY: Yeah.

5 HONORABLE JIM DUNNAM: I can't say
6 anything and I can't say anything when somebody asks my
7 client whether or not he's wearing thong underwear at
8 the deposition. That happened. That happened, and so
9 we -- and the Legislature is just as bad about it.
10 Something isolated, usually on the criminal practice
11 committee, they're doing something in Houston, so we're
12 going to restrict our judges in McLennan County and
13 take away their discretion on something, and I think
14 that is not the right way to do it. If the isolated
15 judges are being -- acting improper then the courts of
16 appeals are there to address that situation, and we
17 should not develop a statewide response.

18 CHAIRMAN BABCOCK: Okay. Judge Rhea and
19 then Steve Susman and then we'll --

20 HONORABLE BILL RHEA: I pretty much
21 agree with what's just been said, and I want to go back
22 to 1863 a little bit. I wasn't sure whether it had
23 gotten very far, but the first we heard of it in Dallas
24 anyway in the judiciary was it was on the consent
25 calendar I think in the Senate, and we were freaking

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1 out when they proposed a time -- minimum time limits.
2 I was ready to be the test case for the
3 constitutionality of the bill at a moment's drop. It
4 was just horrible. I can't imagine anything worse than
5 that bill, and it seems to me that perhaps this is --
6 either intentionally or unintentionally this proposal
7 may be an anecdote to that happening again in the
8 Legislature, which is certainly always a possibility
9 because where it belongs, the Supreme Court needs to be
10 passing the rules if we're to have rules on this, not
11 the Legislature.

12 And I agree that the main focus should
13 be the reasonable time limit. I think that's probably
14 exactly what happened. Some courts are abusing the
15 time limits and making them way too short, but taking
16 away the discretion of a judge, we need to put a
17 reasonable standard on it, and this is a reasonable
18 standard. It's something by which the Supreme Court
19 can look at the particular judge's activities and make
20 a decision appropriately on a case by case basis.

21 The other thing I wanted to mention was
22 the whole -- we talked about this a little bit in our
23 conference call in the subcommittee. The whole issue
24 of I think what a case calls and what I call anyway the
25 concept of creative prejudice in voir dire. Scott went

1 over it a little bit, and it happens fairly frequently
 2 in my court, I'm sure in most courts.
 3 You have a lawyer who will just throw
 4 out a couple of bad facts about his case and then say,
 5 "Based on what you've heard so far would anybody lean
 6 against my client?" Well, sure. He threw out the bad
 7 facts, and I mention that not because it's any big
 8 surprise, but that concept is a big surprise to most
 9 lawyers who practice in my court anyway. They do not
 10 understand that concept, and they think it's outrageous
 11 that somebody shouldn't be stricken for that very
 12 reason.
 13 So it seemed to me, and Judge Peeples
 14 and I talked about, maybe trying to draft some language
 15 if that's doable -- and I don't know that it is -- but
 16 some language perhaps that will help to clarify that
 17 particular point that is so common in my court and I'm
 18 sure all of our courts, to do away kind of with this
 19 expectation that if you throw out a couple of bad facts
 20 and somebody is leaning against you you can get a cause
 21 for strike. I mean strike for cause. So and I agree
 22 with Carlyle, too, that the subcommittee did in essence
 23 agree with some minor changes that the language that
 24 Joe Jamail -- and I don't think we have gone back and
 25 looked at the prior draft, but in any event that

1 Mr. Jamail's language was reasonable and nobody had any
 2 big objections to it as it was proposed.
 3 CHAIRMAN BABCOCK: Steve Susman, then
 4 Judge Medina, then Judge Patterson.
 5 MR. SUSMAN: Do we currently have a rule
 6 that says that the trial judge has discretion to set
 7 reasonable time limits for all aspects of the trial?
 8 See, that's what we ought to do. I mean, if you want
 9 to have a rule, that would be fine. Then they can set
 10 some reasonable time limits for closing argument, for
 11 cross-examination of witnesses, for voir dire, which is
 12 another part of the trial, and "reasonable" gives them
 13 the authority to set the limits, and it also protects
 14 the lawyers and litigants from them being unreasonable
 15 in the limits they set. And I don't see how that kind
 16 of rule could be controversial. The trial judges of
 17 this state have discretion to set reasonable limits for
 18 all aspects of trial, period. I'd favor that kind of
 19 rule.
 20 CHAIRMAN BABCOCK: Judge Medina.
 21 HONORABLE SAMUEL MEDINA: It's going to
 22 get back to reasonable anyway. You set a minimum
 23 standard, I promise you the practicality of it is the
 24 lawyer is voir diring; he says, "My goodness, my time
 25 is up. Judge, because of this case I know I had this

1 amount of time," and the judge is going to say, "Here's
 2 the time you have." Okay. If you want to get specific
 3 times. He's coming back and he says, "Judge, I know
 4 I've gone over the time. It's only reasonable that you
 5 do the following." We're at reasonable now. We ought
 6 to stay reasonable, and I agree. There is a standard
 7 of reasonableness. Hopefully if I'm not being very
 8 reasonable I'm going to get kicked out of office, and
 9 they will get somebody else that's reasonable. We
 10 obviously agree on this.
 11 CHAIRMAN BABCOCK: Judge Patterson, then
 12 Bill Dorsaneo, and then Judge Brown.
 13 HONORABLE JAN PATTERSON: Well, I
 14 actually took my hand down because I think we're
 15 developing a consensus on this, but I do think it's the
 16 respectful approach to use a reasonable standard
 17 because judges can use their discretion, and lawyers,
 18 too. I mean, we've all seen lawyers who have killed
 19 their cases because they have gone on, and it really is
 20 a self-regulating phenomenon, I think, in most courts.
 21 I've also served on juries, and I think jurors want
 22 their time to be well-used. They're not resentful
 23 towards reasonable time, and so I stand in favor of the
 24 reasonableness standard.
 25 CHAIRMAN BABCOCK: Yeah. Bill Dorsaneo.

1 PROFESSOR DORSANEO: I will just get
 2 back to the point that our rules do not say who
 3 conducts voir dire examination really. They don't say
 4 that the judge can do any of it. I mean, those are
 5 important issues in my mind as to who's -- you know,
 6 before we get to whether what they're doing is
 7 reasonable, it's who has the right to do it.
 8 Ask the district judges. I mean, do you
 9 nowadays participate in voir dire examination? That
 10 wouldn't have been true when I started practice. You
 11 would have just filled in the blanks. This is a case
 12 of blank versus blank. When I started practice the
 13 state court judges who became Federal judges did
 14 conduct voir dire examination a little bit because they
 15 were Federal judges and they kind of thought they were
 16 supposed to and then we would correct what they said
 17 when we conducted the voir dire examination immediately
 18 thereafter.
 19 It's an important issue as to who does
 20 it and whether the trial judge can, you know, do some
 21 of it and preclude the lawyers from doing that part.
 22 Our rules don't talk about that because the attitudes
 23 were different before than they are now. I know there
 24 are a lot of judges now who haven't tried as many cases
 25 as some of the judges perhaps who became judges in the

1 before time, or maybe they don't have the same attitude
 2 about what's appropriate and what isn't appropriate.
 3 I think it would be good to have a rule.
 4 We have a rule that goes into equalization of
 5 peremptory challenges in some detail that's based on a
 6 Supreme Court opinion that dealt with these important
 7 questions. I think the rule doesn't necessarily need
 8 to be greatly detailed, but some of these issues are
 9 quite important, and it would be good to put them in
 10 the rule book.
 11 CHAIRMAN BABCOCK: Judge Brown.
 12 HONORABLE HARVEY BROWN: My view is that
 13 we should even kind of do an all or none, and by that I
 14 mean I think we should -- if we are going to adopt
 15 rules for voir dire, we should adopt rules that touch
 16 on many different problems of voir dire, or we should
 17 do nothing, because to just highlight one problem,
 18 i.e., time, is just one of many problems.
 19 And it kind of goes to the issue of how
 20 do we want to develop the law for voir dire. Right now
 21 we're developing it through common law. Are there any
 22 rules as Mr. Susman asked? No, no codified rules. Is
 23 there case law on reasonable time? Yes, there is case
 24 law. A court has been reversed for not giving a
 25 reasonable amount of time. Yes, they have. Can

1 lawyers preserve error? Yes. Do we need new rules to
 2 codify existing common law? I don't think we do, but
 3 if we do, we should do it across the board I think.
 4 I don't think it was a very serious
 5 issue at the Legislature. That was the kind of rumors
 6 we had heard, too, is just a reaction to a particular
 7 case, but I think Mr. Susman's other point about time
 8 limits is good, and that is whether we should look at
 9 time limits for not just voir dire, but if we are going
 10 to do it for that why not everything. In fact, the
 11 ABA's task force that I think you were the chair of
 12 recommended that the Court should adopt a time limit
 13 rule not only for voir dire but for everything, for
 14 evidence, and how to set it up like they do in Federal
 15 court.
 16 The Jury Task Force recommended a time
 17 limits rule across the board, so I think that would be
 18 worth looking at, but I don't think we should just
 19 segregate time for voir dire from everything else in
 20 the trial. If we are going to do time, we should do it
 21 across the board, and if we are going to do voir dire,
 22 I think we should look at all of voir dire or leave it
 23 alone, as it seems to be for the most part working
 24 under the common law.
 25 CHAIRMAN BABCOCK: Let me ask a

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1 question. I know there's many people in the room that
2 do practice in Federal court. My understanding is that
3 the Federal judges allow very little, if any,
4 individual voir dire, and what impact does that have on
5 the quality of justice that you receive in Federal
6 court, Buddy?

7 MR. LOW: Judicial conference it's
8 always discussed. Lucius gets up and says, "I don't
9 let any lawyers ask any questions." Barefoot gets up
10 and he tries to -- he shows -- and they argue back and
11 forth, but the most unpopular thing there is when you
12 say, "I'm not going to let these lawyers ask
13 questions." I mean, that's not popular with most of
14 the Federal judges.

15 It's not popular with the lawyers, and I
16 didn't mean that the Legislature -- if we pass any act.
17 I meant if we pass something that's unpopular with a
18 lot of the lawyers or people then we might see them
19 act. I didn't just mean -- I had no knowledge of the
20 background of this bill, but in Federal court the
21 judges usually will limit.

22 Jamail and I were picking a jury in
23 Bob Parker's court. He said "15 minutes," and Joe
24 didn't believe him. After 15 minutes he believed him.
25 So we then had to ask the court to ask a few questions,

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1 but they do limit it, but you don't know, and if you
2 need a little more time because you got -- one case I
3 had 3,200 plaintiffs. I'm the defendant unfortunately,
4 and the judge gave extra time, but they treat that as
5 it comes up.

6 CHAIRMAN BABCOCK: Judge Patterson and
7 then Luke.

8 HONORABLE JAN PATTERSON: The trend is
9 in the other direction in Federal court because it used
10 to be that in Federal court we had no lawyer voir dire,
11 and many Federal courts have moved to limited voir dire
12 for lawyers, and that's the trend in Federal court, at
13 least it was. My knowledge stopped a year ago.

14 CHAIRMAN BABCOCK: What do you think
15 explains that trend, Judge?

16 HONORABLE JAN PATTERSON: I think,
17 again, it's a respect for the system. I think that the
18 judges recognize that there is a role for voir dire and
19 that the lawyers can best know what that need is in
20 their case and that perhaps a Federal judge may know
21 many things but not the best voir dire in their case,
22 so I think it's a respect for lawyers and judges in the
23 court system. I think it goes to integrity of the
24 system, and Federal judges recognize that.

25 CHAIRMAN BABCOCK: Do you think our

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1 system is out of kelter?

2 HONORABLE JAN PATTERSON: No.

3 CHAIRMAN BABCOCK: Luke.

4 MR. SOULES: Well, two things. I think
5 that the reason that there is limited voir dire in the
6 Federal court system; that is, limited as opposed to
7 none, is that those judges that are allowing that
8 realize that there is some degree of advocacy involved
9 in the voir dire process, and they will endure that for
10 about 15 minutes if you want it, and that's about it,
11 and that may be enough.

12 But there is another piece of this
13 Federal voir dire, and I don't know how it works
14 outside the Western District of Texas, but in our
15 district we don't have absolute standard pretrial
16 orders, but they are pretty standard. We get to submit
17 voir dire questions in our pretrial orders, and the
18 judge considers whether to ask those questions of the
19 jury, and sometimes they don't ask them all, and so we
20 get to give some guidance to the judge about what it is
21 we want to know from this panel before we exercise our
22 strikes.

23 And some of the judges will tell us
24 before they start the voir dire they are not going to
25 ask this string of questions because the judge doesn't

1 perceive the need to ask those kinds of questions, and
2 maybe they're right nine times out of ten, but maybe
3 there's one there that we really need to have asked,
4 and so we tell the judge, "Judge, the reason for this
5 one -- okay about those nine, but the reason for this
6 one is this," and the judge will say, "That's okay. I
7 think they're right on that."

8 So we basically get in a different
9 format a lot of the same information that we need.
10 That process doesn't work too bad over in San Antonio,
11 but -- and I think that -- I don't know how universal
12 including voir dire questions in the pretrial orders
13 is, but it is pretty much universal down in our
14 country.

15 CHAIRMAN BABCOCK: Luke, do you think
16 the state system is out of kelter on voir dire?

17 MR. SOULES: I don't think so as long as
18 the judge sets reasonable limits, but that's going to
19 depend on the case. The biggest case I was ever in in
20 terms of a jury verdict, we started voir dire at about
21 9:00 o'clock, and we had a jury at 1:00 o'clock, with a
22 lunch break. We struck over the noon hour and both
23 lawyers -- they didn't -- they pretty much followed the
24 rules on what's proper or what I think the rules are on
25 what's proper.

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1 HONORABLE SAMUEL MEDINA: State or
2 Federal?

3 MR. SOULES: State. And we got the
4 information that they needed and went on down -- they
5 didn't make opening statements, but they did make
6 statements where they felt that their case might have
7 prejudice either for them or against them, and it was
8 pretty well done, and so I don't -- I haven't had
9 problems with voir dire because the judges in my cases
10 pretty much control things.

11 Sometimes they don't set a limit, but
12 after it goes on for a while we get to break. You
13 know, you have enough breaks during the day. The
14 opening lawyer goes for an hour and ten minutes and
15 then you take a break, and the judge gets to talk to
16 you. And then it goes and they go back and you go for
17 another little while and you get another break, so it
18 seems to me like it works, but I've got no problem with
19 what Steve is suggesting because I think that's what a
20 huge majority of the judges do right now.

21 CHAIRMAN BABCOCK: Linda Eads and then
22 Steve.

23 MS. EADS: In my former incarnation I
24 did tax prosecutions for the Department of Justice all
25 over the United States, and I can say that that

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1 procedure where you submit questions to judges is
2 almost uniform. The purpose for a Federal judge is --
3 for voir dire or voir dire, because believe me it's
4 even more complicated when you get out of Texas.
5 There's a million ways of saying it, is to find out
6 what the conflicts are with what the jury knows or
7 believes or has been exposed to and what the case is.

8 So the judge really spends a lot of time
9 on that and often gives a lawyer some time to develop
10 further conflicts because we do know the case and the
11 judge doesn't, but the whole purpose -- and that leads
12 me to my major point here -- the major purpose of
13 picking a jury in the system, not for us lawyers, who
14 we want to make sure we get 12 or 6 people who are
15 going to vote for us, but the purpose for the system is
16 to make sure that there is no juror that comes to that
17 jury box with a predisposition or a conflict that
18 hasn't been rooted out.

19 And so, you know, the question of how
20 long we get to do jury selection for us as lawyers
21 is -- I mean, we need to be able to figure out who's
22 going to be on our side, not just who's conflict-free,
23 and I think that the Federal courts for a while went
24 way over to the other side by not letting the -- as
25 Judge Patterson said, didn't allow the lawyers to spend

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1 any time with the jury because we do know the facts and
 2 we can root out conflict on those. Now they are coming
 3 back over toward the middle, but the idea that we just
 4 get to spend hours with the jury, basically persuading
 5 them, getting them to love us, getting them to come to
 6 our side, getting them to conflict out on issues that
 7 are irrelevant. That strikes me as an unreasonable
 8 purpose, but the real purpose, the systemic purpose is
 9 jury selection. So I think it's so complicated an
 10 issue that I'd hate for us just to say that there's
 11 nothing we can't do to improve it rulewise, and we need
 12 to spend some time thinking about it.
 13 CHAIRMAN BABCOCK: Steve.
 14 MR. SUSMAN: You know, I think another
 15 thing that you've got to think about in state court
 16 that I've seen happen in the last five years is the
 17 most complicated -- you know, cases with many involved
 18 lawyers are using by agreement jury questionnaires. So
 19 before the voir dire process even begins you know so
 20 much more about these people than we ever dreamed of
 21 knowing before. In fact, there is very little need at
 22 that point in time other than to argue your case for
 23 spending much time in voir dire.
 24 I've found, in my cases at least, the
 25 amount of time in voir dire is going down. It's just

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1 going down, because after they answer the
 2 questionnaire, you know, 20 questions about their life
 3 and what they do and what they like, I mean, you really
 4 basically right there have enough in most cases to make
 5 intelligent decisions in striking jurors, and so, you
 6 know, what's a reasonable time depends also on whether
 7 you have a questionnaire or not and how extensive the
 8 questionnaire.
 9 CHAIRMAN BABCOCK: Yeah. I think jury
 10 questionnaires are enormously helpful --
 11 MR. SUSMAN: Yeah.
 12 CHAIRMAN BABCOCK: -- and absolutely cut
 13 down the time.
 14 MR. SUSMAN: I've never had a lawyer
 15 disagree to do -- I've never had a lawyer in a case I'm
 16 in on the other side disagree on submitting a
 17 questionnaire to the jury. We disagree on particular
 18 questions, and a lot of times, you know, it shortens
 19 the questionnaire considerably when you disagree on
 20 particular questions. I've never seen a lawyer on the
 21 other side disagree on submitting one altogether
 22 because the information helps us both.
 23 CHAIRMAN BABCOCK: Carl.
 24 MR. CHAPMAN: I think you're right,
 25 Steve, with regard to the larger cases, but I think we

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1 should not be -- we should not lose sight of the fact
 2 that many cases that are tried are smaller cases, and
 3 questionnaires are not used or not presented. The
 4 other problem with the questionnaire, specifically in
 5 Federal court, has been my experience, is that when you
 6 submit these questions, you rack your brain to try to
 7 figure out how you can present the question, one, to
 8 get the judge's attention that it's necessary to
 9 present it, and, two, that it has enough substance to
 10 it that you get something from it.
 11 And then the problem is that the judge
 12 gives the question and you have no follow-up because
 13 really what the question has elicited in terms of a
 14 response requires a follow-up, and that's a problem, so
 15 I'm not a real big fan of questionnaires in the
 16 abstract. I think they can be helpful in large cases
 17 where you know you're going to have a large panel
 18 because you need a large panel because there are issues
 19 that will make just 36 or 32 jurors just not work, but
 20 I think that we should not lose sight of the fact that
 21 many cases that are tried in our state courts, in our
 22 district courts, in our courts at law are not the big
 23 cases where questionnaires have been used in the past.
 24 I don't know if we are moving to that. I hope not, but
 25 we shouldn't lose sight of that.

1 CHAIRMAN BABCOCK: The Legislature, I
 2 think, Bob tells me, passed a statute last session that
 3 requires the development of a questionnaire that's
 4 being worked on now; is that right, Bob?
 5 MR. PEMBERTON: That's correct.
 6 HONORABLE SCOTT BRISTER: It's really a
 7 juror information form.
 8 MR. PEMBERTON: Information form, right.
 9 CHAIRMAN BABCOCK: Probably not the
 10 case-specific questionnaire that Steve is talking
 11 about.
 12 MR. PEMBERTON: Right.
 13 CHAIRMAN BABCOCK: Judge Brister and
 14 then Buddy.
 15 HONORABLE SCOTT BRISTER: Just a couple
 16 of quick points. I don't disagree with the case of the
 17 unreasonable time limits, that on a complex case to
 18 give the attorneys 15 minutes I think is outrageous and
 19 on any case to give the attorneys five minutes to me is
 20 an insult. That's obviously a judge who has a problem.
 21 But a couple of things. No. 1, I think
 22 it's important in this committee, the subcommittee,
 23 wherever, that we include the views of the people that
 24 this impacts, which is the jurors. Our tendency
 25 naturally as attorneys is this is what we do, we want

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1 more of it. The people who do object to questionnaires
 2 are jurors. The one lawyer I've heard object to
 3 questionnaires was because she went into a trial, got a
 4 10-page legal spaced questionnaire, and you know what
 5 they ask, questions I would never allow you to ask a
 6 witness like, "What are the last four primaries you
 7 voted in? What's your income? Where do your children
 8 go to school? Any of your family members been
 9 assaulted," et cetera, et cetera.
 10 And you would never -- why are we
 11 allowing more cross-examination of jurors than we would
 12 allow with the parties in the case? These are the
 13 people who object to it. They -- but they have no one
 14 to object for them. Certainly both attorneys, if I was
 15 the attorney in the case, the one question I would want
 16 presented is, "This is what I say. This is what they
 17 say. Who are you going to vote for," because that
 18 tells me whether I want them on the jury, and there are
 19 a multiplicity of ways, and I think in one form or
 20 another the majority of Texas judges allow that
 21 question. I think that's a problem.
 22 So I think in the -- because the same
 23 question -- the question is put in terms of "Who are
 24 you leaning towards?" Now, philosophically and
 25 grammatically the question at this point, "Are you

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1 leaning toward the other side" is indistinguishable
 2 from the question, "If you had to vote right now who
 3 would you vote for?" Those are the same question. I
 4 think it's -- so it's important to get the viewpoint of
 5 nonattorneys because these are the people -- they
 6 outnumber us in a democracy in the long-term -- that
 7 can have dire effects if we don't take their views into
 8 account.
 9 No. 2, I don't think the common law is a
 10 good way to develop this because now in criminal as
 11 well as civil cases you have to prove not only there
 12 was error in the voir dire, but that it caused a wrong
 13 result. Well, if I don't allow a question, that's
 14 easier to prove than if I do allow too many. If I
 15 don't allow a question, you say, "This is the question.
 16 It's a reasonable question. The judge should have
 17 allowed it." If I allowed it, I might have eliminated
 18 some people, et cetera. If I allow too many questions
 19 or strike too many jurors, it is impossible to show
 20 reversible error.
 21 So it's very difficult to -- when I read
 22 the cases -- and I've read hundreds of them on jury
 23 voir dire -- 99 percent have to do with the judge
 24 should not have struck this juror or limited that
 25 question. Well, what is the message to a new judge?

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1 Let them do anything because that's how you get
 2 reversed if you put a restriction on it. I think
 3 that's out of balance in some courts, and a rule would
 4 give some encouragement to bring it back into a
 5 balance.
 6 CHAIRMAN BABCOCK: By the way, I need to
 7 apologize to Judge Brister. He has submitted a paper
 8 or a number of items that I misread his letter and
 9 thought it was supposed to go to only the subcommittee.
 10 It's supposed to go to the entire committee, and we now
 11 have copies there on the back table, right, Carrie? So
 12 pick one up because it's on this topic and has
 13 materials from the Jury Task Force and also some
 14 articles that Judge Brister has written on this
 15 subject, and the only excuse I can offer, Judge
 16 Brister, is --
 17 HONORABLE SCOTT BRISTER: Oh, don't
 18 worry.
 19 CHAIRMAN BABCOCK: -- is that you
 20 referred to me as "Chuck," so I therefore referred this
 21 to the subcommittee, not the entire committee.
 22 HONORABLE SCOTT BRISTER: Sorry.
 23 CHAIRMAN BABCOCK: Buddy.
 24 MR. LOW: I agree with Judge Brister
 25 that we need to consider the public, but if we just

1 that, on this issue of the jury questionnaire, I don't
 2 know if others have experienced this, but I have run
 3 into maybe half a dozen cases where the lawyers are
 4 agreed on a case-specific questionnaire. They have
 5 typed it up themselves. They have clipboards for the
 6 jurors, they have pens, they have, you know, copying.
 7 You know, the court has had to do nothing, and it's
 8 been rejected by the trial judge sometimes for no
 9 reason, no stated reason, sometimes for stated reasons.
 10 That is an issue to me that is worthy of consideration.
 11 HONORABLE SCOTT BRISTER: The problem is
 12 we're getting those on the one-day car wreck cases.
 13 This attorney who complained about the questionnaire
 14 got this ten pages, fills out the ten pages. "Wow,
 15 this must be an important case," and then they start
 16 the oral voir dire, and it's a one-day car wreck case.
 17 HONORABLE HARVEY BROWN: The voir dire
 18 takes as long as the trial.
 19 HONORABLE SCOTT BRISTER: That is out of
 20 balance.
 21 CHAIRMAN BABCOCK: Good point. Yeah,
 22 Tommy.
 23 MR. JACKS: And it's not going to be
 24 fixed by having a rule, because, I mean, the judge who
 25 allows the ten-page questionnaire in a car wreck case

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1 gave them total consideration, they would say, "I don't
 2 want to have anything to do with lawyers," so that
 3 would end it. So we as lawyers know more about the
 4 system than they do. We have to keep in mind their
 5 convenience, their privacy, and things of that nature,
 6 and so I think he certainly has some great ideas.
 7 I just don't know how to answer that
 8 question as far as one of the reasons you need voir
 9 dire time quite often is to find out if a juror is
 10 prejudiced. Now, I don't agree that you can take the
 11 John O'Quinn approach and quiz them for 30 minutes
 12 until you get them to admit it, but if you just ask
 13 across the board, "Are you biased or prejudiced in this
 14 case" you get nothing, and then with a little
 15 development you find out they will admit that they do
 16 have a bias against that and couldn't be fair.
 17 And we need to weed those people out,
 18 and our system is designed to weed out so that we will
 19 have 12 people that will be not influenced, and I've
 20 never heard of a judge that let you ask, "Who do you
 21 hope for?" You can ask, as I did after John O'Quinn
 22 got up for a day of voir dire, I said, "Any of you-all
 23 already got your mind made up," and I've lost right
 24 now. I mean, you know, you can ask the question
 25 whether they are committed. I've got nothing more.

1 was doing a foolish thing. Unless we're going to have
 2 a rule that says you allow a questionnaire in every
 3 case -- and I don't think we're going to do that --
 4 you're still going to have judges who are permitted by
 5 the rule to do foolish things, and I guess I -- on this
 6 business of this rule that Jamail drafted up, I don't
 7 have any problem with that rule, but I also don't know
 8 that we need that rule.
 9 I mean, essentially it seems designed to
 10 do two things. One, to say it's the lawyer not the
 11 judge that gets to do the voir dire, and, two, it's the
 12 judge -- it puts its thumb on the scale on the side of
 13 allowing reasonable time, but it doesn't say what
 14 reasonable is, and the judge who thinks that 15, 30
 15 minutes, whatever, is reasonable is still probably
 16 going to not allow a whole lot more time than that
 17 until there's some appellate decision somewhere that
 18 says that ain't enough, and that's something you can
 19 get right now without a rule where it ain't enough.
 20 I'm not offended by Steve Susman's idea
 21 of, well, let's just have a rule that says a judge can
 22 impose reasonable time limits on everything. It does
 23 concern me some because that judge who now is allowing
 24 15 minutes for voir dire is going to allow you an hour
 25 and a half to put on your case, and I don't know that

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1 CHAIRMAN BABCOCK: Okay. Justice
 2 Duncan.
 3 HONORABLE SARAH DUNCAN: I don't do voir
 4 dire, and I can't remember if we've ever had a voir
 5 dire case in our court, but we have convinced me that
 6 we are not the committee to handle this problem. I
 7 completely agree with Judge Brister that as lawyers we
 8 have a vested interest in this process that may not be
 9 necessary to the system working properly or
 10 advantageous to promoting trial by jury in this state,
 11 and I would suggest that a task force including citizen
 12 nonlawyer members and lawyers and trial judges might be
 13 a better body to look at this particular problem.
 14 CHAIRMAN BABCOCK: I think the Court is
 15 ahead of you because this paper that I didn't send out
 16 to everybody has the results of a task force, a Jury
 17 Task Force that's --
 18 HONORABLE SARAH DUNCAN: I knew there
 19 had been one appointed. I didn't hear what happened.
 20 CHAIRMAN BABCOCK: -- just that
 21 constituency and membership, so I think we need to give
 22 some considerable weight to what they have done.
 23 HONORABLE JAN PATTERSON: And a number
 24 of people here served on it.
 25 CHAIRMAN BABCOCK: Tommy, before we do

1 we need to encourage that.
 2 And I certainly am bothered -- I agree
 3 with Representative Dunnam that if we're going to start
 4 trying to put in what questions you can and can't ask
 5 on voir dire, I mean, I think lawyers know that you're
 6 not going to disqualify anybody for cause in any court
 7 where you have a judge that knows anything by asking a
 8 juror which way they're leaning, and I think if the
 9 lawyer can't figure out which way they're leaning on
 10 the basis of the other stuff they ask, they have got a
 11 problem, but I don't know that that's a problem that
 12 calls for a rule to fix it.
 13 The idea that there is variability
 14 around the state is unavoidable. I mean, I have picked
 15 jurors, and I know that many of you have, in rural
 16 counties where they get the folks in because it's an
 17 inconvenience to bring them in, and they pick several
 18 in the same day, and you can't have necessarily as much
 19 flexibility there as you do in another county where
 20 things are done differently. There is a need for some
 21 variability, and I guess I would seriously have a
 22 question.
 23 I agree with Sarah that some of these
 24 concerns are concerns that we probably aren't the right
 25 people to address anyhow, but I think this committee

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1 should ask itself very seriously do we want to get into
2 this thicket or not. If we're going to, I want to
3 argue that we keep our ambition pretty well under
4 control, but I think we ought to ask ourselves whether
5 we really ought to be writing rules about voir dire at
6 all.

7 CHAIRMAN BABCOCK: Bobby and then Nina
8 and then Luke.

9 MR. MEADOWS: I see the issue a little
10 differently than Tommy. I think that I would support
11 this rule of having lawyers involved in voir dire and
12 have the time be reasonable because I don't think
13 judges who are allowing 5 minutes and 15 minutes in
14 inappropriate cases are doing it because they think
15 that's reasonable. I think they're doing it because
16 they think they can do it and no one is going to
17 challenge it. If you have a rule that says you're to
18 allow a voir dire that's reasonable, at least you're in
19 a position to make that in context, so I do think it
20 would be helpful to have the rule.

21 I hate to see us -- so that's just my
22 thought on that, whether the rule would work. I think
23 that would work across the state and would leave it to
24 the sound discretion of good judges. But whether this
25 committee or some other body works on voir dire, I

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1 would highly support that because in Judge Ray's
2 example of the situation where he tells lawyers who
3 have tried to commit jurors or the jury panel to a
4 certain position and then are shocked that the judge
5 won't cut them loose. I have had the exact opposite
6 experience where a lawyer on the other side would ask
7 questions and get certain jurors committed to a point
8 of view saying they couldn't be fair and then argue to
9 the court, "Well, they have said the matter. You can't
10 rehabilitate a witness who says they can't be fair" and
11 that juror is gone when they shouldn't be gone because
12 they have really been locked into a point of view in
13 the case which is really not -- I don't think is going
14 to be supported by the evidence, and it shouldn't
15 happen in any event.

16 So it's an area of the trial where I
17 think there is a lot of room for misbehavior, and it's
18 also an area of the trial that I think the state court
19 judges want to do something about because most lawyers
20 do it poorly and abuse it, and it really does need, I
21 think, some help. There was a question earlier about
22 the Federal court system and how it works and did we
23 like it. I mean, I tried a case recently in
24 San Antonio, and maybe you grow accustomed to this in
25 the Western District, but we did submit questions and

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1 we did have a chance to talk about, you know, which
2 questions would be asked of the jurors, of the venire,
3 but it was done by a magistrate.

4 I mean, we had been doing all of our
5 pretrials with the judge and then a magistrate comes in
6 and asks the questions in the most lifeless way you can
7 imagine. There was not a single response from the jury
8 panel and then we had to strike from that. So I think
9 lawyers should be involved. I think it's good for
10 judges to participate.

11 I tried a case in Fort Worth a few years
12 ago where the judge stood up and asked questions of the
13 jury, you know, got down off the bench and asked
14 questions, all the tough questions, and then the
15 lawyers got to get up and ask the things they were
16 concerned about, so I think to have judges involved
17 makes sense, but to exclude the lawyers is wrong and to
18 not have reasonable time to do it is wrong.

19 CHAIRMAN BABCOCK: Nina.

20 MS. CORTELL: This is just for the
21 record. Anne McNamara and I were on an advisory
22 committee to the Northern District of Texas, and we did
23 recommend a local rule to the district, a rule of
24 reason, sort of along the lines that Steve Susman had
25 recommended for all parts of the trial, and although

1 some judges were in favor, it was not enacted because
2 the judges wanted to retain individual discretion and
3 didn't want to be put under a reasonable standard.

4 CHAIRMAN BABCOCK: Luke.

5 MR. SOULES: I have been looking through
6 these materials that are behind Judge Brister's letter.
7 On page 149 we see the rule that is recommended by the
8 Jury Task Force, which is pretty good. It kind of gets
9 at this reasonableness thing, and I would bet that
10 there was a lot of debate and a lot of thinking and
11 discussion before this text on page 149 got where it
12 is.

13 HONORABLE SCOTT BRISTER: Correct.

14 MR. SOULES: And Judge Brister affirms
15 that. It's pretty good. After the admonitory
16 instructions by the judge the judge can make a brief
17 statement, may examine as to qualifications, but that
18 won't preclude the parties from doing their own
19 statements and examination, and each one has a right to
20 a reasonable -- each side has a right to a reasonable
21 examination. Some of it may be conducted outside the
22 hearing. You can do that or maybe elsewhere.

23 The court may place reasonable time
24 limits. Each party may examine any prospective juror
25 considering matters reasonably related. The court can

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1 limit the examination if it's unreasonable because it's
2 unduly invasive, leading, or suggestive.
3 Argumentative. "Questions concerning a prospective
4 juror's opinion of applicable law must be prefaced by a
5 proper statement." Not a bad idea. "The party may not
6 inquire as to their probable vote or attempt to
7 commit," and then they have got this rehabilitation
8 thing, which is probably controversial, but it's there
9 and it may --

10 HONORABLE SCOTT BRISTER: That part was
11 intended just to state the law, the current law.

12 MR. SOULES: And it may be responsive to
13 some of Robert Meadows' concerns. You know, this is a
14 pretty good piece of work if you look at it, and if we
15 don't do anything more than this, it at least records a
16 format. It gets -- to a certain extent it gives some
17 direction or some guidance, and I think this is a great
18 piece of work and whoever -- all the people who are
19 responsible for it should be thanked. I think we ought
20 to put this in the materials for the next meeting and
21 as a proposed draft for this new rule so that everybody
22 has a chance to absorb it and then talk about the
23 specifics of this document.

24 CHAIRMAN BABCOCK: Bill.

25 PROFESSOR DORSANEO: I think that's

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1 right. I think, as I said before, there is no rule
2 about the conduct of voir dire examination. Rule 230
3 needs to go into this same, you know, package. That's
4 the rule that says -- that's entitled certain questions
5 shall not be asked. You can't ask a prospective juror
6 whether he or she has been convicted of a felony or
7 misdemeanor theft or is under a legal accusation to
8 that effect. I've always wondered where that rule came
9 from and whether that makes any sense, but it's
10 certainly part of this.

11 JUSTICE HECHT: It came from Article
12 2145, unchanged.

13 PROFESSOR DORSANEO: Well, and I'll bet
14 that came from some other article unchanged. We'll
15 never figure out where it really came from. The
16 related matters, Rule 265, which is the order of trial
17 rule, acts as if the trial begins when opening
18 statements are made, and that needs to be put into this
19 consideration as well.

20 Rule 266, which is the open and close
21 rule, mirrors some of what Jamail's proposal has in it
22 about who gets to go first and how that works, and that
23 needs to be factored into this as well. I've frankly
24 always wondered whether 266 had anything to do with
25 voir dire examination. And then beyond that just our

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1 opening statement rule, whatever we do here, you know,
 2 has some relationship to the opening statement rule.
 3 I can't conceive of any reason why we
 4 wouldn't want to work on this and make some good sense
 5 out of it, and I fully agree with Luke that this
 6 proposal is a pretty good one, although I'm skeptical
 7 about how much judges should get to do here, but maybe
 8 I'm thinking about the judges of yesteryear, and I
 9 won't name names, but I am thinking about some of them,
 10 and I would like for them to just fill in the blank.
 11 "This is the case of X versus Y."
 12 CHAIRMAN BABCOCK: Well, it sounds to me
 13 like -- and let me see if I can state in a general way
 14 what we have been talking about, and it sounds to me
 15 like there is consensus, as there was in the
 16 subcommittee, that reasonable voir dire should be
 17 permitted, and there may not be a complete consensus on
 18 anything else, but that this rule that Judge Brister
 19 has provided us has got a lot of the elements of what
 20 we have been talking about, which people may agree or
 21 disagree with, and I think Luke's right that we ought
 22 to send this back to the committee that Paula and Judge
 23 Peeples are involved in -- although, Judge Brister, are
 24 you on that subcommittee or not?
 25 HONORABLE SCOTT BRISTER: No.

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1 CHAIRMAN BABCOCK: Well, it seems to me
 2 that you should be.
 3 HONORABLE SCOTT BRISTER: Probably
 4 should.
 5 CHAIRMAN BABCOCK: And you should be
 6 because of your work with the Jury Task Force, and I
 7 think next meeting -- and I'm going to throw this out
 8 in terms of a proposal. Next meeting that subcommittee
 9 should report back with a rule, with a proposed rule,
 10 that certainly takes into account the Jury Task Force
 11 rule as well as the comments of Joe Jamail and the
 12 comments that have been made today and then we can
 13 debate this issue with language in front of us, and I
 14 say that, and the only caveat to that is if the people
 15 to my left don't want us to do that.
 16 JUSTICE HECHT: No, I think that would
 17 be right.
 18 CHAIRMAN BABCOCK: Okay. David, is that
 19 okay with you?
 20 HONORABLE DAVID PEEPLES: Yes, it is. I
 21 had two or three things to say or to ask. There were
 22 several statements about the case law, and I think that
 23 there is a lot of -- you can find a lot of principles
 24 in the case law that are pretty clear, and it might be
 25 helpful to restate those if we could agree on them. I

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1 think there are some aspects of the case law that are
 2 not clear, and the cases, frankly, are hard to square
 3 with each other, and we might be doing a service if we
 4 worked on that, and so I just want to suggest that we
 5 might in reworking this rule that Judge Brister gave us
 6 from the Jury Task Force --
 7 HONORABLE SCOTT BRISTER: Yeah, I don't
 8 agree with all of that rule, by the way.
 9 CHAIRMAN BABCOCK: Well, you get a vote.
 10 HONORABLE DAVID PEEPLES: We could state
 11 some principles and lay them out in the rule book which
 12 everybody has on the bench and in their offices as
 13 opposed to having to look up the cases and doing
 14 research. I agree also with the statement somebody
 15 made that this is a serious matter and we ought not to
 16 rush into it.
 17 CHAIRMAN BABCOCK: Okay. Let -- Bill.
 18 MR. EDWARDS: I don't like the
 19 assignment to the subcommittee because it presupposes
 20 that the subcommittee is going to suggest that a rule
 21 similar to what we have been presented is needed or
 22 necessary or comes out. I think that when you start
 23 codifying what the common law is you end up with
 24 unintended consequences of unbelievable proportion.
 25 150 years of jurisprudence has gone into developing the

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1 common law in this area, and for us to sit around in an
 2 afternoon or something and decide that we ought to
 3 change that without any more makes very little sense to
 4 me, and so I don't like the charge "Come back with a
 5 rule that's similar to that." Look at the problem and
 6 see if any rule at all needs to be done and come back
 7 with a rule if you think one is needed, but as for the
 8 substance, I don't think we are, any of us, ready to
 9 deal with that.
 10 CHAIRMAN BABCOCK: Yeah. I think that's
 11 a great point, and I know Judge Peeples agrees with
 12 that, as I do. The threshold issue is do we need a
 13 rule. I think one of the disservices this committee
 14 can do is by advising the Court that we've got to by
 15 rule regulate every little thing that's going on
 16 because as you say, Bill, there are unintended
 17 consequences. If there is a perceived need for some
 18 things in a rule, that ought to be the first question.
 19 So I would amend my charge, and that is
 20 to study, No. 1, do we need it at all; No. 2, what
 21 should it say, and then bring it back to this group for
 22 a discussion on those points. And there is a tendency
 23 particularly when a bunch of lawyers get together is
 24 to -- you know, this four-step or four-point rule on
 25 page 149 all of the sudden becomes a 40-point rule, and

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1 that just engenders more litigation and more
 2 uncertainty, and it does more harm than it does good.
 3 So I completely agree with what you're saying.
 4 On the other hand, the fact of the
 5 matter is that at least one member of the Legislature
 6 has expressed interest in intruding into this area for
 7 whatever reason. The Court has asked us for our
 8 consideration of it. There has been a Jury Task Force
 9 that has spent an enormous amount of time working on
 10 it, and it seems to me it is our function to discuss
 11 these things and to look at it, so that's what I think
 12 we ought to do.
 13 JUSTICE HECHT: And let me just add, the
 14 task force was formed when Judge Cornyn was on the
 15 Court, and he was the liaison to it, and I think Dean
 16 Newton was the reporter for it. I can't remember, and
 17 maybe Jack Ratliff was pretty active in it, but anyway,
 18 it worked for quite a while and has an extensive
 19 report, and Judge Abbott is now the liaison to that
 20 group, and I think their work is completed, but I'm
 21 sure that Greg would be -- would welcome the input of
 22 this group on the committee -- on that task force's
 23 work, but we have -- we will communicate with Judge
 24 Abbott and tell him that you're looking at it. I think
 25 he'll greet that with applause, but then he's never

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1 been here, so...
 2 CHAIRMAN BABCOCK: He may change his
 3 mind.
 4 HONORABLE HARVEY BROWN: Can I ask a
 5 procedural question?
 6 CHAIRMAN BABCOCK: Judge Duncan had her
 7 hand up first and then you, Judge Brown.
 8 HONORABLE SARAH DUNCAN: I got from Pam
 9 a copy of Judge Brister's packet, but is the task force
 10 report too long for us to get a copy?
 11 JUSTICE HECHT: No.
 12 CHAIRMAN BABCOCK: No. In fact, we just
 13 talked to Bob. Bob thought that we all had it. I
 14 don't remember seeing it.
 15 HONORABLE SCOTT BRISTER: It's too long
 16 to read.
 17 MR. PEMBERTON: I thought we forwarded
 18 it all to the chair, but we will get you copies. It is
 19 rather large.
 20 HONORABLE SARAH DUNCAN: I remember when
 21 this task force was appointed, but --
 22 HONORABLE DAVID PEEPLES: About a
 23 hundred pages.
 24 HONORABLE SCOTT BRISTER: It's more like
 25 200 pages.

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1 MR. PEMBERTON: It's about a hundred
2 pages plus appendices. Do you-all want the appendices,
3 too? Okay. We'll get it.
4 HONORABLE SCOTT BRISTER: Well, but the
5 executive summary gives the arguments but the
6 appendices gives the -- you know, the cites to the
7 cases and why, but a big part -- you know, two thirds
8 of the task force was on qualifications, you know, how
9 to draw up the list --
10 MR. PEMBERTON: Right.
11 HONORABLE SCOTT BRISTER: -- and juror
12 compensation and stuff --
13 MR. PEMBERTON: Right.
14 HONORABLE SCOTT BRISTER: -- that
15 wouldn't relate to this discussion.
16 MR. PEMBERTON: Right. A lot of those
17 or some of those proposals already have been enacted
18 into legislation. The uniform jury questionnaire.
19 There was a pay bill last session. Some of these
20 wouldn't pertain to what this committee is doing.
21 CHAIRMAN BABCOCK: Judge Peeples, if you
22 and Paula Sweeney can give us, this committee,
23 something to look at at least a week before we meet
24 again so that we don't have to while we're sitting here
25 at the table try to decide whether the proposals are a

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1 good or a bad idea, and, Carrie, this will be the No. 1
2 agenda item on the next meeting.
3 PROFESSOR DORSANEO: Mr. Chairman?
4 CHAIRMAN BABCOCK: Yeah, Bill.
5 PROFESSOR DORSANEO: I would like to
6 suggest something to what the chair says about this,
7 that we do what we did for the last year of our prior
8 existence, and that's to work from the recodification
9 draft to try to integrate, you know, the work product
10 that we're working on into that draft kind of before a
11 second step needs to be conducted, and I just make that
12 suggestion.
13 CHAIRMAN BABCOCK: We'll talk in just a
14 second about it. Okay. Yeah, Richard.
15 MR. ORSINGER: The family law bar will
16 be vitally interested in any effort to reform the voir
17 dire process, and I'm a little concerned if this
18 committee is going to move to a final resolution at the
19 next meeting, then I've got to get the subcommittee
20 recommendation out and a committee of the Family Law
21 Council in place and studying and being prepared to
22 report back within ten days, not realistic.
23 This is such a central part of our
24 practice I'm wondering if I could get a commitment or
25 an assurance from the chair that at the next full

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1 committee meeting we will not take final votes on the
2 subcommittee proposal so that I have adequate time to
3 get the word out, and if it's possible that we're going
4 to end up with a final product then I've got to have a
5 fire brigade standing by for the second we get the
6 subcommittee proposal, and I don't know if anyone else
7 feels like I do.
8 HONORABLE DAVID PEEPLES: It is
9 inconceivable that we will have a final product by the
10 next meeting.
11 MR. ORSINGER: I won't worry about it
12 then.
13 CHAIRMAN BABCOCK: On the other hand,
14 since you have nothing to do, why don't you get
15 involved with --
16 MR. ORSINGER: That's why I'm against
17 trying to regulate this, see, because once you start
18 down this road everybody has got to get involved in it.
19 It's just like James Madison said in the Federalist
20 papers, the best reason not to have an official
21 religion is because once you have an official religion
22 you create a fight over which religion it's going to
23 be. If we are going to regulate the scope and content
24 of voir dire, you are going to have -- I have got
25 issues like gender bias, race bias, bias against

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1 foreigners, sex abuse claims, alcoholism --
2 CHAIRMAN BABCOCK: It's been said that
3 about you.
4 MR. ORSINGER: -- mental illness,
5 abortion. We get to voir dire juries on these kinds of
6 issues all the time.
7 CHAIRMAN BABCOCK: Yeah.
8 MR. ORSINGER: So when you guys, whoever
9 it is that sits down to regulate the content of voir
10 dire, you're going to get a really big reaction from
11 the family law Bar, and I hope we don't get there, but
12 if we do get there then a lot of us need to get there.
13 CHAIRMAN BABCOCK: Now, I'm sure that
14 the subcommittee is sitting here and listening that
15 there is a -- if not a consensus there is certainly a
16 strain running through this committee that a lot of
17 overregulation in this area is -- that they are not in
18 favor of, so that may or may not inform what we get
19 back. Okay.
20 I don't know if anybody is hungry, but
21 Judge Brown, you're not.
22 HONORABLE HARVEY BROWN: I just want to
23 ask a procedural question about the Jury Task Force.
24 It's made a number of recommendations on things that
25 are related to voir dire such as shuffles, the number

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1 of strikes, and it's also made a number of
2 recommendations about other things such as, for
3 example, the time limits that the ABA adopted. Is that
4 going to be delegated or has it been delegated to some
5 subcommittee to look at? I just wondered if that work
6 is going to get lost or should it go somewhere next.
7 CHAIRMAN BABCOCK: Has it been
8 delegated, Carrie?
9 MR. EDWARDS: I thought you just
10 delegated it.
11 HONORABLE HARVEY BROWN: Well, I thought
12 you only delegated the voir dire part.
13 JUSTICE HECHT: The subcommittee needs
14 to look at the whole thing, except I think the task
15 force goes down and says, "Well, this is really
16 legislative and this could be done by a rule."
17 HONORABLE HARVEY BROWN: Right.
18 JUSTICE HECHT: And so all of the stuff
19 that could be done by a rule the subcommittee needs to
20 look at.
21 MR. PEMBERTON: When I send out the task
22 force report there's a brief article that you may have
23 seen in the Bar Journal a few months ago about what
24 task force proposals have been enacted in the
25 legislation and give you an idea of sort of where we

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1 are and where to go from here.
2 CHAIRMAN BABCOCK: Okay. Is that okay
3 with everybody the way we're proceeding? Have we got
4 any violent objection to it?
5 Okay. Well, why don't we eat and be
6 back at 1:30?
7 (A recess was taken, and the proceedings
8 continued as reflected in the next
9 volume.)
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1 CERTIFICATION OF THE HEARING OF
2 SUPREME COURT ADVISORY COMMITTEE
3 -----
4

5 I, D'LOIS L. JONES, Certified Shorthand
6 Reporter, State of Texas, hereby certify that I
7 reported the above hearing of the Supreme Court
8 Advisory Committee on January 28, 2000, and the same
9 were thereafter reduced to computer transcription by
10 me.

11 I further certify that the costs for my
12 services in this matter are \$ _____.

13 CHARGED TO: Charles L. Babcock .
14

15 Given under my hand and seal of office
16 on this the _____ day of _____, 2000.
17

18 ANNA RENKEN & ASSOCIATES
19 1905-B West 17th Street
20 Austin, Texas 78751
21 (512) 323-0626

22 D'LOIS L. JONES, CSR
23 Certification No. 4346
24 Cert. Expires 12/31/2000
25 #005,034DJ

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